

Access to justice in State aid matters in EU Member States

Where do NGOs stand?

Authors of the country reports

For Bulgaria: Dessislava Fessenko

For the Netherlands: Doortje Ninck Blok, Joep Rieff, Gerard van der Wal (Windt Le Grand Leeuwenburgh B.V.)

For Poland: Robert Zajdler, Maciej Bernatt, Lukasz Grzejdzia, Marta Sznajder, Robert Pogorzelski (Zajdler Energy Lawyers & Consultants)

The law firms which authored the reports for Austria, Belgium, France, Germany, Greece and Spain preferred to remain anonymous.

Authors for ClientEarth

Juliette Delarue
Senior Environmental Democracy lawyer/juriste
jdelarue@clientearth.org

Catherine Derenne
State aid lawyer/juriste
cderenne@clientearth.org

This project was coordinated by Jakub Torenc, Programme Coordinator, jtorenc@clientearth.org

Nothing in this document constitutes legal advice and nothing stated in this document should be treated as an authoritative statement of the law on any particular aspect or in any specific case. The contents of this document are for general information purposes only. Action should not be taken on the basis of this document alone. ClientEarth endeavours to ensure that the information it provides is correct, but no warranty, express or implied, is given as to its accuracy and ClientEarth does not accept any responsibility for any decisions made in reliance on this document.

Contents

- Top Lines.....3**
- About ClientEarth and our national experts.....4**
- Background.....5**
- Purpose and scope of this study6**
- Our questions6**
- EU Member States studied7**
- Key findings8**
- Annex 1: Our questions13**
- Annex 2: Country reports16**
- Austria17**
- Belgium25**
- Bulgaria34**
- France.....43**
- Germany50**
- Greece58**
- The Netherlands67**
- Poland.....88**
- Spain.....119**

Top Lines

- This study aims to contribute to the debate about access to justice for NGOs and the public in State aid matters. It assesses the possibilities to obtain access to justice for NGOs to bring State aid cases before national courts in nine EU Member States: Austria, Belgium, Bulgaria, France, Germany, Greece, the Netherlands, Poland and Spain. The country reports were prepared by expert lawyers in each country. The introduction and summary, including key findings and conclusions, were written by ClientEarth based on these reports.
- In eight of the nine researched Member States, there is no instance of NGOs bringing an action against a State aid measure. In these eight states, there is also no clear and consistent jurisprudence that gives standing to parties other than NGOs, whose competitive position is not affected by the grant of illegal aid. In the Netherlands, the only state with instances of previous NGO litigation, a recent judgement of the Supreme Court appears to indicate that NGO standing may not be available any longer as well.
- ClientEarth's take is that claimants who are most likely to argue and demonstrate that an aid is granted in breach of EU environmental law are deprived from the procedural rights necessary for doing so, at EU level (as found by the Aarhus Convention Compliance Committee¹) as well as at national level, as this study shows. In addition, due to the limited powers of national courts in State aid matters, this confirms that access to justice at national level is not a substitute for access to justice at EU level, but should be complementary to it.
- The country reports also show that there is a lack of transparency and no consistent practice in providing for public participation on State aid schemes at national level. This makes it in practice even more difficult for NGOs and the general public to monitor and engage in relation to national State aid procedures.

¹ Findings of 17 March 2021 in communication ACCC/C/2015/128.

About ClientEarth and our national experts

ClientEarth is an environmental NGO which uses the law to protect people and the planet. For a number of years, ClientEarth has been advocating for EU State aid rules to align with environment and climate protection objectives that are now contained in the European Green Deal; and for the Commission to assess compliance of aid beneficiaries and of aid measures with environmental law as part of its assessment of the compatibility of aid measures.² ClientEarth is also strongly engaged in improving access to justice rights for NGOs and the public in environmental matters before the Court of Justice of the European Union ('CJEU') and national courts.

The country reports for this study were prepared by external lawyers and academics qualified in each relevant jurisdiction and with a specialisation in State aid law. Some wished to remain anonymous.

Whereas our experts analysed the rules in each country, the introductory part of the study, key findings and general conclusions were drawn by ClientEarth. The views expressed about the lack of access to justice in State aid matters at EU and national level and why this makes it difficult to ensure a proper enforcement of EU environmental law and of State aid law, are attributable to ClientEarth only.

² See e.g. ClientEarth report 'A State Aid Framework for a Green Recovery: Mainstreaming climate protection in EU State aid law' (September 2020), available at: <https://www.clientearth.org/latest/documents/a-state-aid-framework-for-a-green-recovery-mainstreaming-climate-protection-in-eu-state-aid-law/>.

Background

In September 2020, the CJEU ruled in the case *Austria v. Commission* ('Hinkley Point C', C-594/18P) that the Commission must check that a State aid measure or the beneficiary's activity must comply with environmental law and principles for the aid to be compatible with the internal market.

Even though environmental NGOs would be well placed to bring actions for annulment of Commission State aid decisions breaching environmental law **before the CJEU**, the admissibility requirement to be "individually and directly concerned by the decision" is a very high threshold to meet for an NGO. No environmental NGO was ever found admissible to directly challenge a State aid decision before the CJEU. The threshold is also very high to intervene in an action brought by a third party such as a market operator, although some local NGOs have been found admissible to do so in specific cases.³

It is due to these legal obstacles that in March 2021, the Aarhus Convention Compliance Committee (ACCC) found the EU in breach of Article 9(3) the Aarhus Convention for failing to provide access to justice to NGOs against Commission's State aid decisions breaching environmental law – and that EU law must change.⁴ Until October 2022, the Commission has been consulting stakeholders on how to align EU law with the ACCC's recommendations. Some of the replies to the public consultation suggest that NGOs should rather seek remedies against breaches of environmental law by State aid measures or beneficiary activities **before national courts**.⁵

In support of this position, some respondents argued that the measure having a concrete effect on the beneficiary and potentially on the environment, is the national aid granting decision rather than the Commission's approval thereof; therefore it would be more effective to challenge the aid measure before national courts, which are also empowered to grant remedies (such as suspending or recovering aid).

Actions before national courts are encouraged by the Commission itself which, in its Notice on the enforcement of State aid law by national courts⁶, recommends that "*In light of Article 47 of the Charter of Fundamental Rights of the European Union, individuals and organisations with no standing to request the annulment of a State aid decision under Article 263 TFEU should be given the opportunity to challenge the aid or measures implementing the aid before national courts and trigger a reference under Article 267 TFEU to the Court of Justice for a preliminary ruling on the interpretation or validity of the Commission decision authorising that aid. In that situation, not only economic interests, but also other interests of individuals and organisations can be relevant to establish their standing in proceedings relating to the national measures*

³ See our assessment of the case law in: Delarue, J., Bechtel, S.D. Access to justice in State aid: how recent legal developments are opening ways to challenge Commission State aid decisions that may breach EU environmental law. *ERA Forum* 22, 253–268 (2021), available at: <https://doi.org/10.1007/s12027-021-00665-7>.

⁴ Findings and recommendations with regard to communication ACCC/C/2015/128 concerning compliance by the European Union, adopted by the Compliance Committee on 17 March 2021, available at: https://unece.org/sites/default/files/2021-10/ECE_MP.PP_C.1_2021_21_E.pdf.

⁵ The contributions to the public consultation are available at: https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13462-Aarhus-Convention-Compliance-Committee-case-on-State-aid-implications-options/public-consultation_en.

⁶ Commission Communication C/2021/5372, OJ C 305, 30.7.2021, p. 1–28.

implementing the aid, depending on the measures and national procedures in question” (point 27). The Notice further specifies that “*This may be the case, for instance, for environmental protection*” with a reference to the above mentioned *Austria v. Commission* judgment and to the Notice on access to justice in environmental matters.⁷

Purpose and scope of this study

Despite the above Commission’s recommendations, and besides the limited powers of national courts in State aid matters⁸, the possibilities for NGOs to bring an action at national level greatly vary and depend on the rules and potential practical obstacles (such as procedural costs) of access to justice in each Member State.

The object of the Study was therefore to provide an overview of the access to justice rules (standing, competent courts, procedural costs) applicable and available to NGOs to challenge State aid measures or schemes in each relevant EU Member State.

Our questions

We asked our national experts to reply to 16 questions, based on their legal analysis of the current legal framework, case law and trends in their jurisdiction. You can find them in Annex 1: Our questions.

The questions relate to the context of this study (is the interaction between environmental law compliance and State aid discussed in the Member State); standing of NGOs; frequency as to which national courts hear environmental law compliance claims in State aid cases; visibility of aid measures for the public (organisation of public consultations, transparency, access to information); procedural costs.

We considered all these questions important to assess whether NGOs and more broadly, the public, have effective access to justice in State aid matters at national level. For instance, a person will not challenge an unlawful or incompatible aid measure (for contravention with environmental law or otherwise) if s/he has no information about the aid in the first place or is deterred from bringing such an action by prohibitive court fees.

⁷ Commission Notice on access to justice in environmental matters, C/2017/2616, OJ C 275, 18.8.2017, p. 1–39.

⁸ National courts’ powers are limited to determining if a measure qualifies as State aid under Article 107(1) TFEU and whether it has duly been notified to the Commission under Article 108(2) TFEU before being granted (the ‘standstill obligation’). National courts can also suspend or order the recovery of unlawful aid or of aid declared incompatible by the Commission. However, a national court is not empowered to determine if an aid measure is compatible with Article 106 or 107(3) TFEU and must refer this determination to the Commission. Furthermore, even if an NGO is found admissible, there is no guarantee that the national court will refer a question on the validity of a Commission’s State aid decision to the CJEU given the discretion that national courts dispose of to refer preliminary questions. The Commission’s [Study on the enforcement of State aid rules and decisions by national courts](#) (2019) confirms that preliminary references are sporadic in State aid matters, in particular on the validity of Commission’s decisions.

EU Member States studied

The nine EU Member States included in this study are: Austria, Belgium, Bulgaria, France, Germany, Greece, the Netherlands, Poland and Spain. We invite you to read Annex 2: Country reports.

These countries were selected as a priority primarily based on the size of their markets and volume of granted State aid.

Due to limited resources, ClientEarth was not able to cover more EU Member States. Nevertheless, the diversity of profiles and rules of the countries studied enable us to identify trends and key findings.

Key findings

This section synthesises the findings of the country reports. We invite you to refer to [Annex 2](#) for the full analysis conducted by our national experts and for references to relevant legislation and case law.

1. Caveat – Limited powers of national courts

National courts in EU Member States are fully part of the system of State aid control – but do not enjoy unlimited powers. Their role is limited to assessing whether a measure qualifies as State aid and was notified to the EU Commission when required;⁹ and to order damages and/or suspension or recovery of an aid measure, either when it was granted in breach of the ‘standstill obligation’ (before it was authorised by the Commission) or after the Commission found the aid was incompatible with the internal market.¹⁰ **National courts basically control that the State aid procedure is followed and order remedies.**

They are also responsible for referring questions on the interpretation or validity of EU law, including of decisions of the EU Commission, to the CJEU when necessary to solve a national case.

However, pursuant to Article 108 of the Treaty on the Functioning of the European Union (‘TFEU’), the EU Commission is vested with the exclusive competence to assess whether a State aid measure (to be) granted by a Member State is compatible with the internal market. **Given that compliance of an aid measure or of the beneficiary’s activities with EU environmental law is a condition of compatibility of the aid with the internal market, this assessment logically falls outside the jurisdiction of national courts.**

Our take: For this reason, a judicial action at national level is not sufficient to enforce the EU Commission’s obligation to check compliance of aid measures with environmental law, pursuant to the case law of the CJEU. Nevertheless, it is very important that NGOs, or other claimants, have an easy access to national courts in State aid matters because national courts are primarily responsible for enforcing public authorities’ procedural obligations (organising public consultations and notifying aid measures to the EU Commission when required; ordering recovery of unlawful or incompatible aid, or other remedies) – all of which influence the granting of aid that may contravene environmental law.

2. State aid and environmental law – an interaction that was not yet addressed

Our experts could not report any statement from national public authorities or courts addressing the interaction between State aid and environmental law and the findings of the CJEU in *Austria v. Commission* (C-594/18 P). It also appears that environmental law claims

⁹ State aid granted in line with the General Block Exemption Regulation do not need to be notified to the EU Commission. A national court can verify whether the conditions of this regulation are fulfilled.

¹⁰ See [New Commission notice](#) on the enforcement of State aid rules by national courts, OJ C 305, 30.7.2021, p. 1–28.

were not made in the (very few) State aid cases heard by national courts up to this date, in the countries studied.

Most of our experts do not exclude that environmental law-related claims could be made, in theory, based on the possibility for parties to make claims of violations of other areas of law (e.g. public procurements) in support of their claim against an aid measure. However, our experts in the Netherlands underline the absence of powers of national courts to rule on the compatibility of aid with the internal market, which environmental law compliance is a component of (see also key finding 1).

Our take: In our view, the absence of case law on this topic can be explained by two factors. First, the requirement that an aid measure or aid beneficiary must comply with environmental law was clarified only recently (in 2020) in the CJEU's case law – even though it could be deduced from previous case law. Second, environmental law compliance claims are not typically raised by market participants or public authorities – which are nearly the only actors engaged in national State aid litigation so far (see key finding 3). We can make the same observation about cases brought before the EU courts. Until there is clarity on, and effective access to justice for NGOs to bring State aid cases (see key finding 3), it is unlikely that such case law will develop.

We underline that NGOs, where they have effective access to justice, can bring certain, 'classic' environmental law claims before their national courts and obtain a ruling finding that an operator or a public authority breaches environmental law; but the public financing of the projects contravening environmental law would usually remain unaddressed before that court. The NGOs may also file a complaint to the EU Commission by providing evidence (including a national judgment) that an aid beneficiary breaches environmental law, and request that the EU Commission investigate the aid; but unless they are found to be formal 'interested parties' – a status DG COMP regularly denies them – the EU Commission has no obligation to act. In any event, a complaint does not give NGOs access to justice for challenging the ultimate decision of the Commission clearing the aid, as the case may be.

3. Standing of NGOs cannot be positively confirmed

It is clear from the country reports that some national jurisdictions have more practical experience with State aid cases than others. For instance, our in-country expert only found two judgments on State aid enforcement in Bulgaria. This is unsurprising and consistent with previous analysis.¹¹

As to the standing of NGOs, two clear conclusions can be drawn from the country reports:

First, **in eight of the nine researched Member States, there is no instance of NGOs bringing an action against a State aid measure** (see answers to question 4). Only in the Netherlands, NGOs acted against the grant of aid. However, a recent decision from the Supreme Court in civil proceedings (case *Stichting Karmedia*, 2020) severely restricted the admissibility requirements, undermining the chances for an NGO to rely on the standstill provision in future. Our national experts consider it possible that administrative courts could

¹¹ See European Commission, Directorate-General for Competition, Monti, G., Bas, P., Meindert, L., et al., *Study on the enforcement of state aid rules and decisions by national courts : final study*, Publications Office, 2019, <https://data.europa.eu/doi/10.2763/793599>.

rely on this judgment to restrict the admissibility of NGOs to act before administrative courts as well. Therefore, in State aid-related cases, in none of the researched Member States there is a clear and established practice of NGO standing, the only outlier being litigation before the Dutch civil courts.

Second, **in the same eight out of nine Member States**, there is no clear and consistent jurisprudence that gives standing to parties whose competitive position is not affected by the grant of illegal aid (see answers to question 3). This means that there is no jurisprudence that would be obviously and directly transferable to an NGO seeking to obtain standing (given that NGOs are not competing on the market). Moreover, the complementary analysis conducted in the country reports, based on the general standing rules for NGOs in environmental matters and the thresholds required to show an interest to bring a State aid case (notably for market participants) demonstrate that **it is unlikely that an NGO would be admissible to challenge an aid measure before national courts based on existing standing rules**. In most countries, the claimant's legal interest depends on whether its economic situation is affected by the grant of aid, as opposed to a public interested defended by an NGO.

Our take: While the absence of case law means that theoretically there is still room to test such cases, the low likelihood of success will serve as a practical deterrent for NGOs. Due to the limited resources available for public interest litigation, NGOs will usually not be in a position to risk losing a case based on standing, without the case even proceeding to the substance. This applies in particular to smaller, local NGOs with limited financial capacity. This is particularly unfortunate because those organisations are precisely the ones that are the closest to the matter at hand e.g. engaged in protecting a natural area and residents from the construction of a harmful project which environmental impact assessment is deficient.

4. Public consultations are not consistently organised

The country reports show that the practice of organising public consultations on the design or granting of an aid measure vary between the Member States. Consultations are more often organised at national level than at local level despite the fact that many aid measures are granted by regional or local authorities.

As for trends in the Member States, in the Netherlands it is common practice to consult on legislation and does not appear to discriminate State aid-related matters. In Greece, public consultations are generally organised on the adoption of a law or an implementing act; but not when aid is granted pursuant to a different regime such as by contract. Relevant public consultations in Poland are sporadic even though the legal framework for doing so exists or sometimes would require it. In Spain and Belgium, consultations occur on general policy plans, under which aid schemes may be anticipated; but consultations on a specific aid are not the norm.

This being said, none of the country reports identified specific obstacles for NGOs to participate in such public consultations when they take place. In our experience, practical obstacles such as very short periods to reply to a public consultation on an aid measure may arise. However, this is case-specific; we do not have data suggesting that this occurs specifically in consultations related to aid measures in which risks of environmental law violations, or of harming the environment, could be identified.

NGOs could also attempt to raise State aid-related arguments in environmental law-related public consultations but this would rarely be strictly within the scope of the consultation.

Our take: Public consultations may become more frequent for some types of schemes, driven by new requirements in the Climate, Environmental Protection and Energy Guidelines of 2022 for instance; but we do not anticipate them becoming a general practice given that Member States do not have a legal (EU or national) obligation or an established democratic culture of doing so. In any case, a meaningful public consultation cannot take place without informing the public about the planned measures, considering that transparency remains poor (see key finding 5).

5. Transparency is limited

Whereas all the Member States in this study have some form of national or local State aid registers, several country reports show important deficiencies such as a lack of a centralised register combining aid granted at national and at local levels (e.g. in Bulgaria); incomplete data or mere availability of the EU State Aid Transparency Register (e.g. for Belgium), which is notoriously incomplete.

Consequently, in combination with the lack of *ex ante* public consultations (see key finding 4), several country reports conclude that it is easier for the public to hear about a State aid measure via the media.

The EU Commission's own register only records decisions taken by the EU Commission, but contains no data relating to notification of a measure prior authorised (or not) by the Commission, or a timeline. Access to information on State aid measures is also notoriously restricted at EU and national level, often due to alleged confidentiality of business secrets pursuant to which public authorities withhold data such as amounts or conditions of an aid measure granted to a specific operator. However, a decision to refuse to disclose information is reviewable by the courts in all the Member States studied.

Our take: Transparency of public spendings (or other advantages granted to market operators) is not only a principle of good governance in and for itself; it is an enabler for proper accountability of the public authorities. Without basic data and visibility on the timeline per which an aid is designed and granted, NGOs and the wider public are unable to scrutinise and, where appropriate, challenge and raise awareness of an aid measure granted in breach of the law. This undermines accountability of public action and control.

6. Procedural costs vary between administrative and civil courts

Procedural costs (excluding lawyers and experts fees) are reasonably low to launch an action before administrative courts in all the Member States studied.

However, when court fees depend on the amount at stake – which can be high in State aid – before civil courts, they can skyrocket. In Poland, the maximum fees (excluding lawyers and experts fees) reach about €43,000; this is noteworthy given that large amounts of aid are granted by contract in Poland. In Bulgaria, court fees amount to 4% of the monetary equivalent of the damages claimed in civil cases at first instance and 2% at cassation level.

In all jurisdictions, the losing party is at risk of having to pay the winning party's procedural costs.

Our take: Affordable procedural costs are an important feature of access to justice, as a matter of law: Article 9(4) of the Aarhus Convention provides that "*the procedures referred to in [paragraph 3, under which EU Commission's State aid decisions fall¹²] shall provide adequate and effective remedies, including injunctive relief as appropriate, and be fair, equitable, timely and not prohibitively expensive.*" Prohibitively expensive costs deter parties with limited resources such as NGOs or individuals from exercising their rights – which ultimately hinders accountability of public authorities.

¹² Findings and recommendations with regard to communication ACCC/C/2015/128 concerning compliance by the European Union, adopted by the Compliance Committee on 17 March 2021. Although these findings only relate to the EU, one may not exclude that national decisions granting State aid could contravene environmental law and thus also fall under Article 9(3) of the Aarhus Convention.

Annex 1: Our questions

Context

1. Have the public authorities or national courts in the Member State expressed any public opinion or issued any ruling referring to the application of the *Austria v. Commission (Hinkley Point C)* judgment and its implications at national level (e.g. on checks to be performed before or after granting aid, interactions with the EU Commission, or access to justice rules or practices)? If yes, please provide a short summary as well as a reference to where this public opinions or judgements can be accessed.
2. Are public consultations organised at national or local level on planned aid measures or schemes? Please specify if this includes all or only certain planned measures or schemes and whether these consultations are open to participation by environmental NGOs. Please provide recent examples of such consultations with the references to the relevant websites.

Standing

3. Which of the administrative or civil courts are competent to challenge government measures in court for alleged illegal State aid and for asking remedies (including suspension, recovery of aid and damages)? Do the rules differ (and how) between administrative and civil courts?
4. Have national courts recognised standing of parties whose competitive position is not affected by the grant of illegal aid?¹³ Please reply with “yes”, “no” or “unclear”. If the reply is “yes”, please also specify whether the national courts applied the EU General Court ruling in *Streekgewest Westelijk Noord-Brabant v Staatssecretaris van Financien* (C-174/02, paragraph 19) – or have developed their own jurisprudence.
5. If the answer to question 4 is “yes”, do environmental NGOs¹⁴ have standing before national administrative bodies (if any) or courts¹⁵ competent in State aid matters to challenge government measures for alleged illegal State aid? Please reply with “yes”, “no” or “unclear”.
6. If the answer to question 5 is “yes”, which criteria do NGOs need to fulfil to be granted standing (some examples of criteria may include registration / accreditation with a specific body; number of members; certain period of existence; requirements as to its statutory purpose or form of incorporation; relationship between its activities and the aid challenged etc.)? Are the criteria different for foreign NGOs (i.e. not registered in the country where the aid is challenged)?

¹³ This question is not limited to the standing of environmental NGOs – see question 5 in this respect. The objective of question 4 is to understand whether some entities which are not market participants, or not competing with aid beneficiaries can be found admissible in national State aid cases whatever their object is. If there are no case law or rules for environmental NGOs in the relevant Member State, it would still help us draw analogies or comparisons.

¹⁴ Please note that we distinguish NGOs (not for profit associations) from trade associations whose members are active on a market (the latter often being capable of justifying that their members are directly affected by the grant of aid due to their competitive position being affected, which is not the case for an NGO).

¹⁵ Please also indicate if the regime differs between administrative and judicial courts.

7. Has an NGO with an environmental object previously brought an action against a State aid measure or scheme in the Member State and been recognised by the courts as being entitled to do so? Please reply with “yes” or “no”. If the answer is “yes”, please also detail the context and the outcome of the judgement(s) concerned (admissibility and merits of the action).
8. Have national courts already relied on / referred to point 27 of the revised Commission’s Notice on the enforcement of State aid law by national courts recommending to grant standing to NGOs? Please reply, to the best of your knowledge, with “yes” or “no”. If yes, please also provide a short summary as well as a reference to where the relevant judgement can be accessed.

Available grounds

9. Can a claimant (any category) raise claims related to violations of EU or national environmental law by an aid measure or an activity in support of an action aiming at challenging the grant of aid? Please reply with “yes”, “no” or “no data”.
10. Are there examples of cases where such claims were raised (if so please detail the context and outcome)?
11. More generally, are there instances of claimants (any category) alleging, in support of an action challenging an aid measure or scheme, that a State aid measure or activity breached EU or national law that is not directly State aid law (other than environmental law, which is covered by question 9 above, such as law on public procurements, planning law, tax law etc.)? Please detail the context and the outcome (competence of the courts, merits of the claim and potential test applied by the court¹⁶, potential reference for preliminary ruling to the CJEU under Article 267 TFEU)?
12. Have there been any instances in the Member States of a national court referring the **validity of a Commission’s State aid decision** to the CJEU under Article 267 TFEU between 1 January 2019 and 31 December 2022?¹⁷

Procedural costs risks

13. If the answer to question 5 is “yes”, what are the procedural costs and potential adverse costs to be incurred by an NGO for bringing a State aid-related action before a national court, both in case the challenge is ultimately successful and if it unsuccessful?

Remedies

14. In case the reply to questions 4 and/or 5 is yes, what remedies are available to non-competitor applicants before an administrative body (if any) or a court in case of breach of environmental law by an aid measure or by the activity?

¹⁶ For instance, did the national court verified if the breach was ‘inextricably linked’ with the aid measure (or any equivalent test) in order to admit and rule on the claim, or is there not a specific test in this respect?

¹⁷ Any type of Commission’s decision, not necessarily the ones with environmental law relevance. We are particularly interested in statistics since 2018 that would not have been included in the Commission’s Study on the enforcement of State aid rules and decisions by national courts (2019).

Transparency

15. How can third parties find out about possible planned, illegal or incompatible State aid from official sources? Are there national registers? What publicity is given to the granting of aid and to its notification to the EU Commission?
16. Please provide details of any national legislation that gives third parties access to documents on State aid granted to beneficiaries that are held by national public authorities.¹⁸

¹⁸ Note that on EU level, access to documents related to open State aid files held by the European Commission are (usually) covered by a general presumption of confidentiality, which means that access to them cannot be requested under the applicable EU transparency laws (Regulations 1049/2001 and 1367/2006). This question aims to understand the extent to which access to documents held by national authorities are accessible.

Annex 2: Country reports

Austria

Context

1. **Have the public authorities or national courts in the Member State expressed any public opinion or issued any ruling referring to the application of the Austria v. Commission (Hinkley Point C) judgment and its implications at national level (e.g. on checks to be performed before or after granting aid, interactions with the EU Commission, or access to justice rules or practices)? If yes, please provide a short summary as well as a reference to where this public opinions or judgements can be accessed**

We are not aware of any such publicly made comments or rulings.

2. **Are public consultations organised at national or local level on planned aid measures or schemes? Please specify if this includes all or only certain planned measures or schemes and whether these consultations are open to participation by environmental NGOs. Please provide recent examples of such consultations with the references to the relevant websites.**

No, we are not aware of public consultations organised systematically at a national or local level specifically on planned aid measures or schemes.

A recent example where State aid was at least mentioned is the Austrian *Aufbau- und Resilienzplan*, where a public consultation was open until 26 February 2021 and which pointed out that proposals should take into account compliance with EU State aid law.¹⁹ In its Annex, it is listed for each project whether and how EU State aid law would apply.²⁰ It should be noted though, that this did not mean that the State aid law analysis had to be checked against environmental law requirements.

However, public or local consultations are relevant for environment-related plans, programs and strategies or decision-making procedures.²¹ Several governmental measures that were part of the context and background of State aid measures were subject to a public consultation prior to their implementation.²²

Accredited environmental NGOs have a status as interested parties in environmental impact assessments as part of administrative proceedings.²³ The Austrian Environmental Agency (*Umweltbundesamt*) maintains a database where current and past environmental impact assessment procedures can be found.²⁴

¹⁹ [https://www.oesterreich.gv.at/dam/jcr:128795c0-63c2-4165-8c02-97700cfb6199/\(PDF\)_Oeffentliche_Konsultation_zum_nationalen_Aufbau-_und_Resilienzplan.pdf](https://www.oesterreich.gv.at/dam/jcr:128795c0-63c2-4165-8c02-97700cfb6199/(PDF)_Oeffentliche_Konsultation_zum_nationalen_Aufbau-_und_Resilienzplan.pdf), page 8.

²⁰ <https://www.oesterreich.gv.at/dam/jcr:e0b131c9-f2d9-40f8-9350-d533bc9bf4c9/Anhang%20zum%20%C3%96sterreichischen%20Aufbau-%20und%20Resilienzplan%202020-2026.pdf>

²¹ See, for example, Section 3 para 1 of the Umweltverträglichkeitsprüfungsgesetz 2000 – UVP-G 2000.

²² See, for example, SA.52263, para 6, referring to the Renewable Energy-Act-Package (EAG) of 27.07.2021 BGBl. I Nr. 150/2021; SA. 41175, paras 19 et seq, referring to the governmental aid scheme BBA2020, https://www.ffg.at/sites/default/files/allgemeine_downloads/Breitband/srl_bba2020_access_20180206.pdf

²³ Section 19 para 1 No 7 UVP-G 2000. If the authority concludes that no environmental impact assessment is necessary, then environmental NGOs may have recourse to legal remedies: Section 3 para 9, Section 24 para 5a and Section 32 para 1 UVP-G 2000.

²⁴ <https://www.umweltbundesamt.at/umweltthemen/uvpsup/uvpoesterreich1/uvp-dokumentation#c1690>

There are precedents that parties have tried to invoke State aid arguments during a public consultation process. Yet, a State aid measure may or may not be included in an environmental procedure that has been subject to a public consultation beforehand. In that case, the aid itself is not then subject to the consultation process, but the law or measure into which it is integrated is. In a 2008 decision, the ‘*Umweltsenat*’ (Environmental Senate), an independent appeals body within the public administration,²⁵ decided that environmental impact assessment procedures, arguments related to infringements of EU State aid law are not admissible.²⁶ The *Umweltsenat* decision was upheld by the *Verwaltungsgerichtshof* (Supreme Administrative Court). Interestingly, it did – unlike the *Umweltsenat* – briefly assess (but still rejected) the substantive merits of the applicant’s argument that not imposing certain environmental requirements on a competitor’s waste treatment facility amounted to unlawful State aid.²⁷

Standing

3. Which of the administrative or civil courts are competent to challenge government measures in court for alleged unlawful State aid and for asking remedies (including suspension, recovery of aid and damages)? Do the rules differ (and how) between administrative and civil courts?

There is no special procedural regime for State aid private enforcement.²⁸

In principle, the *Bundes-* and *Landesverwaltungsgerichte* as well as the *Bundesfinanzgericht* (administrative courts) are competent to hear challenges of (administrative) government measures in court for alleged unlawful State aid and to order recovery. This results from the constitutional principle of the separation of powers, as the administrative courts are competent to decide on the legality of acts of administrative authorities.²⁹ Legislative acts may be challenged before the Constitutional Court.

However, State aid questions can also arise in civil proceedings (mostly in competitor actions), leading civil courts to implicitly analyse State aid law³⁰ and – in some cases – asking for recovery of aid.³¹ The claimant will often invoke means of unfair competition law (*Bundesgesetz gegen den unlauteren Wettbewerb* (UWG)), alleging that a competitor³² might have received aid incompatible with the common market and demand recovery/cease-and-desist.

²⁵ The *Umweltsenate* were abolished in 2014 in favour of a two-tier administrative court system. For more background, see Johannes Kresbach, *Abschied vom Umweltsenat, Neubeginn beim Bundesverwaltungsgericht. Zur Umgestaltung und Neuregelung der Rechtsmittelverfahren bei Umweltverträglichkeitsprüfungen in Österreich*, <http://www.eiaportal-at-sk.eu/attachments/article/29/Abschied%20vom%20Umweltsenat.pdf>.

²⁶ See *Umweltsenat*, decision of 04.07.2008, US 1A/2008/14-6, para 3.1.

²⁷ VwGH, decision of 26.05.2011, 2008/07/0156, ECLI:AT:VWGH:2011:2008070156.X00.

²⁸ A. Egger, *Study on the enforcement of State aid rules and decisions by national courts – Country Report Austria*, p. 2, <https://state-aid-caselex-accept.mybit.nl/report>

²⁹ M. Köhler, *Private enforcement of State aid law*, EStAL 2/2012, p. 369, 379 and 384.

³⁰ See e.g. OGH, decision of 19.01.2010, 4 Ob 154/09i ECLI:AT:OGH0002:2010:0040OB00154.09I.0119.000; OGH decision of 21.06.2011, 4 Ob 40/11b, ECLI:AT:OGH0002:2011:0040OB00040.11B.0621.000, para 4.

³¹ OLG Wien decision of 26.02.2018, 1 R 163/17y, ECLI:AT:OLG0009:2018:00100R00163.17Y.0226.000, paras 3.5.1. et seq.

³² It is necessary that there is a competitive relationship between the claimant and the defendant to invoke Section 1 UWG, see OGH decision of 15.12.2008, 4 Ob 133/08z, ECLI:AT:OGH0002:2008:0040OB00133.08Z.1215.000, para 2.1.

In civil proceedings the claimant must demonstrate that s/he is affected by the decision.³³ In administrative legal proceedings, only applicants bringing forward that their rights were impaired by an administrative decision have standing.³⁴ When challenging a law or bylaw, the applicant must also demonstrate that measure is infringing upon his/her legal sphere.³⁵ In this context, it is interesting to point out that specifically for NGOs there is no standing before the Constitutional Court when they invoke EU environmental law, even in matters in which they have standing before the administrative courts.³⁶

4. Have national courts recognised standing of parties whose competitive position is not affected by the grant of unlawful aid? Please reply with “yes”, “no” or “unclear”. If the reply is “yes”, please also specify whether the national courts applied the EU General Court ruling in *Streekgewest Westelijk Noord-Brabant v Staatssecretaris van Financien (C-174/02, paragraph 19)* – or have developed their own jurisprudence.

Unclear. We are not aware of decisions granting standing to non-competitors who were not themselves addressee of the measure.

In a case where an interested buyer of a forest invoked Art. 108(3) TFEU regarding the sale at advantageous conditions to another buyer, the Supreme Court of Austria referred to para. 19 of the *Streekgewest* ruling. It still noted, though, that the claimant, who (unlike the buyer) was not yet active in the market for forestry or agriculture, would still qualify as a “ad-hoc competitor”.³⁷ In another case, the arguments of a shareholder who was affected by a mandated capital reduction in the context of a renationalization of a company based on alleged unlawful State aid of the measure were rejected as due to lack of standing, for example.³⁸ In several fiscal disputes, it was ruled that a tax debtor cannot rely on State aid arguments to likewise obtain an exemption of an aid granted to another debtor.³⁹

The only exception we are aware of to a competitor bringing forward State aid arguments, which were substantially assessed by the courts, are not indicating a general standing for non-affected parties or non-competitors. Such are cases where the State itself maintains that a measure is unlawful State aid as a defence (for example in a case where the applicant invoked a provision of national tax law which the defendant authority refused to apply,⁴⁰ or in a case in which the State defended itself against claims based on a State guarantee given in favour of a distressed undertaking).⁴¹

³³ See e.g. OGH decision of 19.01.2010, 4 Ob 154/09i, ECLI:AT:OGH0002:2010:0040OB00154.09I.0119.000, para 1.3.

³⁴ Art. 132 para 1 No 1 Federal Constitutional Law (B-VG).

³⁵ VfGH, decision of 07.10.2021, ECLI:AT:VFGH:2021:G88.2021, para IV.3; VfGH decision of 30.09.2020, G 144-145/2020-13, V 332/20-13, paras 55 et seq; Art. 139 para 1 No 3, Art. 140 para 1 No 1 lit c B-VG.

³⁶ VfGH decision of 18.03.2022, E2107/2021, ECLI:AT:VFGH:2022:E2107.2021, para III; VfGH decision of 29.04.2022, E285/2022, ECLI:AT:VFGH:2022:E2107.2021, para III.

³⁷ OGH, decision of 19.01.2010, 4 Ob 154/09i, ECLI:AT:OGH0002:2010:0040OB00154.09I.0119.000, para 1.3. See for a similar factual situation, but without the court referring to the requirement of competition: VwGH, decision of 25.02.2022, ECLI:AT:VWGH:2022:RA2020110196.L00, paras 42 set seq.

³⁸ OGH, decision of 27.04.2015, 6 Ob 90/14z, ECLI:AT:OGH0002:2015:0060OB00090.14Z.0427.000, para 3.6. But cf. VwGH, decision of 08.09.2020, W276 2166051-2, ECLI:AT:BVWG:2020:W276.2166051.2.00, for a similar factual situation. where the Supreme Administrative Court discussed State aid aspects even though the applicant did not seem to have explicitly raised those.

³⁹ VwGH, decision of 18.05.2016, Ro 2014/17/0117, ECLI:AT:VWGH:2016:RO2014170117.J00, para 15; VwGH, decision of 18.10.2017, ECLI:AT:VWGH:2017:RO2016130012.J00, para 23. In another case, a court (very briefly) discussed and rejected the existence of State aid when a notary invoked that argument against his obligation to pay mandatory social security contributions: VwGH, decision of 17.12.2014, 2012/08/0168, ECLI:AT:VWGH:2014:2012080168.X02, para 3.

⁴⁰ BFG, decision of 16.02.2019, RV/7101189/2018, ECLI:AT:BFG:2019:rv.7101189.2018.

⁴¹ OLG Wien decision of 26.02.2018, 1 R 163/17y, ECLI:AT:OLG0009:2018:RW0000909.

5. **If the answer to question 4 is “yes”, do environmental NGOs have standing before national administrative bodies (if any) or courts competent in State aid matters to challenge government measures for alleged unlawful State aid? Please reply with “yes”, “no” or “unclear”.**

Answer to question 4 is no/unclear.

6. **If the answer to question 5 is “yes”, which criteria do NGOs need to fulfil to be granted standing (some examples of criteria may include registration / accreditation with a specific body; number of members; certain period of existence; requirements as to its statutory purpose or form of incorporation; relationship between its activities and the aid challenged etc.)? Are the criteria different for foreign NGOs (i.e. not registered in the country where the aid is challenged)?**

Answer to question 5 is no.

However in principle, the UVP stipulates that environmental NGOs may have standing if they fulfill the following criteria:⁴²

1. it has the protection of the environment as its primary purpose according to the statutes of the association or the declaration of foundation,
2. it pursues non-profit objectives within the meaning of sections 35 and 36 BAO, Federal Law Gazette No. 194/1961, and
3. it has existed for at least three years with the purpose stated under No. 1 before filing the application according to para. 7.

An individual NGO must consist of at least one hundred members. An association of NGOs must comprise at least five member organisations which meet the criteria of subsection 6(1) to (3) and which together reach the number of members required for five recognised environmental organisations. The corresponding number shall be made credible to the authority.

Such NGOs must submit an application for accreditation and the *Bundesland* in which they are active. The NGO may have only standing in those *Bundesländer*.⁴³ These accreditations are subject to periodic renewals.⁴⁴

In cases where a project has effects on neighbouring countries, foreign NGOs that would have standing in that country can have standing in Austria as well.⁴⁵

7. **Has an NGO with an environmental object previously brought an action against a State aid measure or scheme in the Member State and been recognised by the courts as being entitled to do so? Please reply with “yes” or “no”. If the answer is “yes”, please also detail the context and the outcome of the judgement(s) concerned (admissibility and merits of the action).**

No. We are not aware of such actions.

⁴² Section 19 paras 6 and 10 UVP-G 2000.

⁴³ Section 19 paras 7 and 8 UVP-G 2000. A number of other acts also granting standing to NGOs also refer to the criteria of the UVP-G 2000, see e.g. Section 42 No 13 and 14 of the Waste Management Act (AWG 2002) or Section 6 paras 7 to 9 of the Emissions Act – Air (EG-L 2018).

⁴⁴ Section 19 para 9 UVP-G 2000.

⁴⁵ Section 19 para 11 UVP-G 2000.

8. **Have national courts already relied on / referred to point 27 of the revised Commission’s Notice on the enforcement of State aid law by national courts recommending to grant standing to NGOs? Please reply, to the best of your knowledge, with “yes” or “no”. If yes, please also provide a short summary as well as a reference to where the relevant judgement can be accessed.**

No. We are not aware of such decisions.

Available grounds

9. **Can a claimant (any category) raise claims related to violations of EU or national environmental law by an aid measure or an activity in support of an action aiming at challenging the grant of aid? Please reply with “yes”, “no” or “no data”.**

No data. We are not aware of such claims.

10. **Are there examples of cases where such claims were raised (if so please detail the context and outcome)?**

No data.

11. **More generally, are there instances of claimants (any category) alleging, in support of an action challenging an aid measure or scheme, that a State aid measure or activity breached EU or national law that is not directly State aid law (other than environmental law, which is covered by question 9 above, such as law on public procurements, planning law, tax law etc.)? Please detail the context and the outcome (competence of the courts, merits of the claim and potential test applied by the court, potential reference for preliminary ruling to the CJEU under Article 267 TFEU)?**

No. We are not aware of such claims.

However, there are precedents in the Austrian case law of parties that have invoked various EU law arguments such as infringing fundamental freedoms alongside the argument that a measure also constituted unlawful State aid in actions challenging certain laws.⁴⁶ These cases concerned measures by which the claimants were directly negatively affected (tax schemes or levies). These were not notified to the Commission, and the courts rejected, without referring the case to the ECJ under Article 267 TFEU, the plaintiff’s arguments that the measures constituted State aid.

⁴⁶ See, with regard to the *Stabilitätsabgabengesetz*, BGBl. I Nr. 111/2010, e.g. BFG, decision of 14.04.2016, RV/1100178/2016, ECLI:AT:BFG:2016:rv.1100178.2016; VwGH, decision of 23.01.2019, Ro 2016/12/0012, ECLI:AT:VWGH:2017:RO2016120012.J02, para 8; BFG, decision of 23.03.2021, RV/4100273/2019, ECLI:AT:BFG:2021:rv.4100273.2019, Section c). On a law concerning levies imposed on gambling establishments: VwGH, decision of 16.12.2015, 2013/17/0326, ECLI:AT:VWGH:2015:2013170326.X00, para 14.3. On a marketing levy for milk: BVwG, decision of 08.06.2018, W270 2182942-1/6E, ECLI:AT:BVWG:2018:W270.2182942.1.00, paras 3.2.3.12 et seqq.

12. Have there been any instances in the Member States of a national court referring the validity of a Commission's State aid decision to the CJEU under Article 267 TFEU between 1 January 2019 and 31 December 2022?

No, we are not aware of such references.

Austrian courts in general have taken a rather cautious approach when considering referring questions to the ECJ for a preliminary ruling. Courts have recognised an obligation to refer only when the assessment of a national legal provision under EU law seems necessary, which in turn is a question for the national court to decide, and only.⁴⁷ Applicants do not have the right to demand a request for preliminary ruling, but may only suggest the Courts to refer a case under Art. 267 TFEU.⁴⁸

Procedural costs risks

13. If the answer to question 5 is “yes”, what are the procedural costs and potential adverse costs to be incurred by an NGO for bringing a State aid-related action before a national court, both in case the challenge is ultimately successful and if it unsuccessful?

Answer to question 5 is no.

In Austrian civil proceedings, applicants have to pay fees to the Court which are determined by the value of the proceedings.⁴⁹ Once a final decision is issued, the 'loser pays it all'-principle applies,⁵⁰ which includes the costs of the opponent's legal counsel, determined on the basis of statutory fees.⁵¹

In administrative court proceedings, applicants need to pay a lump sum in the amount of 30 EUR.⁵²

Remedies

14. In case the reply to questions 4 and/or 5 is yes, what remedies are available to non-competitor applicants before an administrative body (if any) or a court in case of breach of environmental law by an aid measure or by the activity?

Answer to questions 4 and 5 are no.

A difficulty for NGOs challenging State aid measures is that the remedy applicable to competitors, the recovery of the aid, aims at restoring the distortion of competition (whereas NGOs are not part of competition). From the OGH judgment of 19 January 2010, it is apparent that declaratory judgments on the nullity of sales contract at issue or its pending ineffectiveness are not admissible due to the lack of legal interest therein. The

⁴⁷ BFG, decision of 23.02.2021, RV/7102750/2020.

⁴⁸ See e.g. OGH, decision of 21.11.2022, 8Ob135/22v, ECLI:AT:OGH0002:2022:0080OB00135.22V.1121.000, para 8; OGH, decision of 05.07.2019, 4Ob35/19d, ECLI:AT:OGH0002:2019:0040OB00035.19D.0705.000, para 4.

⁴⁹ See the Law on court fees (*Gerichtsgebührengesetz*).

⁵⁰ See Section 41 Civil Procedure Code (*Zivilprozessordnung*).

⁵¹ See Law on attorney rates (*Rechtsanwaltstarifgesetz*).

⁵² See Section 2 of the *Verordnung des Bundesministers für Finanzen betreffend die Gebühr für Eingaben beim Bundesverwaltungsgericht sowie bei den Landesverwaltungsgerichten*, BGBl. II Nr. 387/2014; Section 35 Law on Administrative Court Proceedings (*Verwaltungsgerichtsverfahrensgesetz*).

OGH reasons that direct remedies are available to the applicant competitor (namely cease and desist) which render the need for a declaratory judgment void.⁵³ With respect to hypothetical actions by NGOs, two possible inferences could be made. Courts could either argue based on this precedent that absent a direct remedy based on unfair competition law available to NGOs, declaratory judgments may be admissible. Or, Courts may argue in the opposite way that, as a general rule, declaratory judgments in private enforcement actions against unlawful State aid are never a valid remedy.

Transparency

15. How can third parties find out about possible planned, unlawful or incompatible State aid from official sources? Are there national registers? What publicity is given to the granting of aid and to its notification to the EU Commission?

The transparency and reporting requirements are a central component of the European Commission's State aid control. For the fulfillment of these obligations, the Commission provides three electronic notification systems: 1. State Aid Notification Interactive 2 (SANI2), 2. State Aid Reporting Interactive (SARI) and 3. Transparency Award Module (TAM). All three databases are used not only in connection with notifiable State aid but also, for example, in the granting of aid under the General Block Exemption Regulation. De minimis aid and aid for services of general economic interest are not subject to notification or reporting requirements in SANI2, SARI and TAM.

The funding agencies themselves are responsible for recording them in the electronic notification systems. Within Austria, the Federal Ministry for Labour and Economy and Federal Ministry of Finance act as coordinating bodies. The State aid measures are then published on the website of the Federal Ministry of Labour and Economy⁵⁴ and Federal Ministry of Finance, which maintains a data base on State support measures, whether or not they constitute State aid (it includes also e.g. de-minimis measures or measures benefitting individuals/NGOs).⁵⁵

16. Please provide details of any national legislation that gives third parties access to documents on State aid granted to beneficiaries that are held by national public authorities.

Data may only be transferred to third parties if federal regulations provide for this or the person concerned has consented to the transfer. Business secrets in the sense of Sections 26a ff of the Federal Law against Unfair Competition 1984 (UWG), Federal Law Gazette No. 448/1984 as amended, must be explicitly disclosed to the funding agencies and may not be transmitted to third parties, see Section 4, para. 6 of the *Datenschutzgesetz*.⁵⁶ The *Datenschutzgesetz* does not provide access to documents by third parties in such matters. Such a right also does not arise from the *Verordnung des Bundesministers für Finanzen über Allgemeine Rahmenrichtlinien für die Gewährung von*

⁵³ OGH decision of 19.01.2010, 4 Ob 154/09i, ECLI:AT:OGH0002:2010:0040OB00154.09I.0119.000, para 3.2.

⁵⁴ Which maintains a data base on support opportunities: <https://www.bmaw.gv.at/Services/Foerderungen.html>

⁵⁵ <https://transparenzportal.gv.at/tdb/tp/berichte/>

⁵⁶ BGBl. I Nr. 165/1999.

*Förderungen aus Bundesmitteln*⁵⁷, which is based on Section 30 para. 5, Section 16 para. 2, Section 58 paras. 1 and 2 as well as Section 60 para. 6 of the *Bundeshaushaltsgesetz*.⁵⁸

Unlike many other EU Member States, Austria has no general freedom of information legislation. Art. 20 para 3 of the Austrian constitution (*Bundes-Verfassungsgesetz*) stipulates the principle of official secrecy. The current legislation, the *Auskunftspflichtgesetz* is considered to be one of the weakest legislative instrument in the world, and does not convey the right to receive documents.⁵⁹ However, the current government has published plans to enact a freedom of information Act within the current legislative period.⁶⁰

The Courts do, however, acknowledge an increased public interest in access to information on beneficiaries of State aid measures.⁶¹

Bibliography

- Austrian Federal Ministry of Finance, „Österreichischer Aufbau- und Resilienzplan 2020-2026“ (2021)
- Austrian Federal Ministry of Finance, „Anhang 1:Österreichischer Aufbau- und Resilienzplan 2020-2026“ (2021)
- Austrian Federal Ministry for Traffic, Innovation and Technology, „Breitband Austria 2020“ (2018)
- Köhler, Martin, “Private Enforcement of State Aid Law – Problems of Guaranteeing EU Rights by means of National (Procedural) Law”, EStAL 2/2012, pp. 369-387
- Kresbach, Johannes, ‘Abschied vom Umweltsenat, Neubeginn beim Bundesverwaltungsgericht. Zur Umgestaltung und Neuregelung der Rechtsmittelverfahren bei Umweltverträglichkeitsprüfungen in Österreich‘
- Access Info/Centre for Law and Democracy, Global Right to Information Rating – Austria (2016)
- Profil, „Edtstadler: Neuer Entwurf zur Informationsfreiheit bis Juni“ (2023)
- Spark Legal Network, the European University Institute, Ecorys and Caselex “Final Study on the enforcement of State aid rules and decisions by national courts (COMP/2018/001)”

⁵⁷ BGBl. II Nr. 190/2018.

⁵⁸ BGBl. I Nr. 139/2009, last changed by BGBl. I Nr. 62/2013.

⁵⁹ <https://www.rti-rating.org/country-data/Austria/>

⁶⁰ <https://www.profil.at/oesterreich/edtstadler-neuer-entwurf-zur-informationsfreiheit-bis-juni/402342159>.

⁶¹ See BVwG, decision of 28.7.2021, W214 2235505-1/27E, ECLI:AT:BVWG:2021:W214.2235505.1.00.

Belgium

Context

- 1. Have the public authorities or national courts in the Member State expressed any public opinion or issued any ruling referring to the application of the Austria v. Commission (Hinkley Point C) judgment and its implications at national level (e.g. on checks to be performed before or after granting aid, interactions with the EU Commission, or access to justice rules or practices)? If yes, please provide a short summary as well as a reference to where this public opinions or judgements can be accessed.**

We are not aware of any such publicly made comments or rulings.

- 2. Are public consultations organised at national or local level on planned aid measures or schemes? Please specify if this includes all or only certain planned measures or schemes and whether these consultations are open to participation by environmental NGOs. Please provide recent examples of such consultations with the references to the relevant websites.**

Federal level: The government's website refers to a public consultation on the environment: '*National Energy and Climate Plan*⁶²'. This consultation, now closed, was open to the public, so NGOs could participate.

Local level (provinces and communes): Public consultations can be organised⁶³. However, we are not aware of any public consultation having been set up on State aid measures.

Regional level: In Flanders, the administration is currently working on a page that lists all open consultations (although they are not yet accessible)⁶⁴. Otherwise, they work with 'advisory groups' such as *Minaraad*⁶⁵. These councils are composed of civil society organizations, interest groups, experts and/or citizens. They usually have a fixed composition and give non-binding advice on request or on their own initiative.

Standing

- 3. Which of the administrative or civil courts are competent to challenge government measures in court for alleged unlawful State aid and for asking remedies (including suspension, recovery of aid and damages)? Do the rules differ (and how) between administrative and civil courts?**

In Belgium, there are no specific courts with exclusive powers to hear cases concerning the public (actions by public authorities) or private (actions by private parties) enforcement of State aid rules.

Belgian law does not show a clear set of rules concerning the recovery of unlawful State aid and/or declared incompatible with the internal market. Therefore, public entities granting an aid have to choose between invoking civil or administrative law according to

⁶² [Results of the public consultation on the National Energy and Climate Plan are available | Belgium.be, NEKP | Vlot en veilig mobiliteitssysteem \(plannationalenergieclimat.be\)](#)

⁶³ [Organiser des consultations populaires communales et provinciales \(wallonie.be\)](#)

⁶⁴ [Geef uw mening over nieuwe beleidsvoorstellen | Vlaanderen.be](#)

⁶⁵ [Milieu- en Natuurraad van Vlaanderen \(Minaraad\) — Minaraad](#)

the act that is being contested and which will determine also the competent court⁶⁶. Similarly, private parties must select the competent court according to the type of action they choose to enforce State aid law: challenge of an administrative act, challenge of a public or private contract, launch an action for damages, launch an action for recovery, launch an action for interim measures, launch an action for cease and desist orders (unfair competition law), etc.⁶⁷.

On the one hand, if the act is based on administrative act, the Council of State is competent to annul and suspend illegal administrative acts.

On the other hand, the ordinary (commercial or civil) courts could also be competent. Disputes between companies or a private individual against a company can be brought before the commercial courts (nowadays called *Tribunal de l'entreprise* or *Ondernemingsrechtbank*, which can be translated to English as *Business Court*). When private parties aim to challenge the State and bring an action that does not seek to obtain the annulment of a State measure but to launch an action for damages and rule on the State's liability, it is possible to bring an action before the ordinary courts⁶⁸.

Furthermore, the Constitutional court controls the legal basis of an aid measure according to the division of powers between the State, the Communities and the Regions or according to the fundamental rights and liberties guaranteed in Section II of the Constitution, the principle of legality of taxation, and the principle of non-discrimination in fiscal matters. If the concerned legislative act is illegal, the Constitutional court has the power to annul it, to declare it unconstitutional and to suspend it⁶⁹.

4. Have national courts recognised standing of parties whose competitive position is not affected by the grant of unlawful aid? Please reply with “yes”, “no” or “unclear”. If the reply is “yes”, please also specify whether the national courts applied the EU General Court ruling in *Streekgewest Westelijk Noord-Brabant v Staatssecretaris van Financien (C-174/02, paragraph 19)* – or have developed their own jurisprudence.

No. We are not aware of such decisions.

⁶⁶ Study on the enforcement of State aid rules and decisions by national courts, Country reports Belgium, p. 2.

⁶⁷ See for general references:

Study on the enforcement of State aid law at national level, 2006, T. Jestaedt, J. Derenne, T. Ottervanger; *Update of the 2006 Study on the Enforcement of State Aid Law at National Level*, 2009, Jacques Derenne; *Enforcement of EU State aid rules at national level – 2010 – Reports from the 27 Member States*, Jacques Derenne, Alix Müller-Rappard, Cédric Kaczmarek (eds), Lexxion, Berlin, 2010, pp. 363;

State aid and private enforcement: An overview of EU and national case law, 2020, J. Derenne and C. Barbu-O'Connor;

Remedies in EU Competition Law: Substance, Process and Policy, J. Derenne, C. Barbu-O'Connor, C. Chilaru, 2020, Kluwer Law International;

State aid and private enforcement: An overview of EU and national case law, 2023, J. Derenne and D. Jouve.

⁶⁸ *Idem*, p. 3.

⁶⁹ *Idem* p. 2.

- 5. If the answer to question 4 is “yes”, do environmental NGOs have standing before national administrative bodies (if any) or courts competent in State aid matters to challenge government measures for alleged unlawful State aid? Please reply with “yes”, “no” or “unclear”.**

The answer to question 4 is unclear. However, since the implementation of an aid measure covers not only the aid as such, but also its method of financing, an individual may have an interest in relying before the national court on the direct effect of such prohibition not only in order to erase the negative effects of the distortion of competition created by the granting of unlawful aid, but also in order to obtain a refund of a tax hypothecated to the financing of an aid measure to third parties⁷⁰. The fact that the claimant is not affected by the distortion of competition arising from that aid measure is irrelevant to the assessment of its interest in bringing proceedings, provided that they are subject to the tax or charge by which that aid is fully financed.

It is for the national courts to uphold the rights of the persons concerned in the event of a possible breach by the national authorities of the prohibition on putting aid into effect, taking all the consequential measures under national law with regard to both the validity of decisions giving effect to aid measures and the recovery of the financial support granted.

The question to know who can invoke Article 108 (3) TFEU has been clarified in *Streekgewest* (that you rightly mentioned at question 4). This case shows that it is not a *sine qua non* obligation to be a competitor to challenge an unlawful aid but it is already enough to be a third party affected by a tax financing the measure without being a competitor. Even it does not relate to State aid as such, the *Law of 12 January 1993 on a right of action for the protection of the environment*, amended in 2018, covers the standing of NGOs (“legal person whose corporate purpose is the protection of the environment”). It provides that, without prejudice to the powers of other courts under other legal provisions, the president of the Court of first instance, at the request of the public prosecutor, an administrative authority or such legal person establishes the existence of an act constituting a clear violation or a serious threat of violation of one or more provisions of an act relating to environmental protection. Therefore, NGOs could have, in principle, standing before the Court of first instance regarding civil acts (e.g. contracts) that would allow the granting of unlawful State aid, when these violate or threaten to violate environmental protection acts.

- 6. If the answer to question 5 is “yes”, which criteria do NGOs need to fulfil to be granted standing (some examples of criteria may include registration / accreditation with a specific body; number of members; certain period of existence; requirements as to its statutory purpose or form of incorporation; relationship between its activities and the aid challenged etc.)? Are the criteria different for foreign NGOs (i.e. not registered in the country where the aid is challenged)?**

Regarding the *Law of 12 January 1993 on a right of action for the protection of the environment* various conditions apply. First, the corporate purpose of the NGO must be the protection of the environment. Second, it has defined in its articles of association the territory to which its activity extends. Third, it fulfills the conditions set out in Article 17, paragraph 2, 1° to 4° of the Judicial Code. These conditions are quite strict and can be an obstacle to NGOs.

⁷⁰ C.J.E.U., 27 October 2005, C-266/04, *Casino France e.a*, paragraph 40.

There is also the possibility to launch an action before the Council of State to suspend or annul the act.

- 7. Has an NGO with an environmental object previously brought an action against a State aid measure or scheme in the Member State and been recognised by the courts as being entitled to do so? Please reply with “yes” or “no”. If the answer is “yes”, please also detail the context and the outcome of the judgement(s) concerned (admissibility and merits of the action).**

There is no case law on State aid.

However, it should be noted that in a preliminary ruling referred to the ECJ by a Belgian court⁷¹, the Court of Justice stated that during the period prescribed for the transposition of an environmental directive, Member States must refrain from taking any measures liable seriously to compromise the prescribed outcome. An analogy could be made in the field of State aid. Indeed there is no reason to believe that an NGO would not have standing to bring proceedings before a national court to challenge a measure implemented by a Member State compromising the objectives set out in State aid rules, such as Guidelines on State aid for climate, environmental protection and energy 2022⁷².

- 8. Have national courts already relied on / referred to point 27 of the revised Commission’s Notice on the enforcement of State aid law by national courts recommending to grant standing to NGOs? Please reply, to the best of your knowledge, with “yes” or “no”. If yes, please also provide a short summary as well as a reference to where the relevant judgement can be accessed.**

There is no available data.

Available grounds

- 9. Can a claimant (any category) raise claims related to violations of EU or national environmental law by an aid measure or an activity in support of an action aiming at challenging the grant of aid? Please reply with “yes”, “no” or “no data”.**

No data.

As mentioned above, an action to request the end of a measure threatening the environment can be lodged before administrative or civil courts, not specifically to challenge a State aid measure but any measure (in a general way).

Nevertheless, we are not aware of any precedent.

- 10. Are there examples of cases where such claims were raised (if so please detail the context and outcome)?**

No. We are not aware of such claims.

⁷¹ C.J.E.U., 18 December 1997, C-129/96, *Inter-Environnement Wallonie*.

⁷² Communication from the Commission, *Guidelines on State aid for climate, environmental protection and energy 2022*, (2022/C 80/01), 18 February 2022.

- 11. More generally, are there instances of claimants (any category) alleging, in support of an action challenging an aid measure or scheme, that a State aid measure or activity breached EU or national law that is not directly State aid law (other than environmental law, which is covered by question 9 above, such as law on public procurements, planning law, tax law etc.)? Please detail the context and the outcome (competence of the courts, merits of the claim and potential test applied by the court, potential reference for preliminary ruling to the CJEU under Article 267 TFEU)?**

We are not aware of any action challenging an aid measure or scheme which breached another branch of law than State aid law.

The number of remedies granted in comparison with the overall number of lodged actions before national courts is low. This is mainly due to the fact that in many cases the competent court ruled that no State aid was granted. In some cases, the court found that the claim was not well-founded or that the aid constituted existing aid⁷³.

- 12. Have there been any instances in the Member States of a national court referring the validity of a Commission's State aid decision to the CJEU under Article 267 TFEU between 1 January 2019 and 31 December 2022?**

There have not been any instances according to the CJEU database.

Procedural costs risks

- 13. If the answer to question 5 is "yes", what are the procedural costs and potential adverse costs to be incurred by an NGO for bringing a State aid-related action before a national court, both in case the challenge is ultimately successful and if it unsuccessful?**

Answer to question 5 is no.

When an action is brought before the Council of State:

The Council of State may require the unsuccessful applicant or defendant to pay a procedural indemnity to the successful party. This is a very limited lump-sum contribution to the costs and lawyers' fees of the latter party. A basic amount has been fixed for this purpose, but this can be increased or decreased to a certain extent depending on the circumstances of the case. This compensation cannot be granted or imposed on an intervening party⁷⁴.

By ministerial decree of 22 June 2022, the amounts of the procedural indemnity for proceedings before the Administrative Jurisdiction Division of the Council of State were indexed⁷⁵.

⁷³ Study on the enforcement of State aid rules and decisions by national courts, Country reports Belgium, p. 4.

⁷⁴ Le site officiel du Conseil d'Etat, Procédure, Contentieux administratif, L'indemnité de procédure.

⁷⁵ Arrêté ministériel relatif à l'indexation de l'indemnité de procédure visée à l'article 67 de l'arrêté du Régent du 23 août 1948 déterminant la procédure devant la section du contentieux administratif du Conseil d'Etat, le 22 juin 2022.

The ministerial decree provides that⁷⁶ :

“The basic, minimum and maximum amounts of the procedural allowance referred to in Article 67(1) of the Decree of the Regent of 23 August 1948 determining the procedure before the Administrative Jurisdiction Division of the Council of State are increased by 10 p.c., in accordance with Article 67(3) of the same Decree, and amount to **770 euros** for the basic amount, **154 euros** for the minimum amount and **1,540 euros** for the maximum amount”.

It follows that the legal cost cannot be regarded as an obstacle to access justice for NGOs.

When an action is brought before civil courts:

Unless the judge decides otherwise, the losing party must pay **legal costs** which correspond to the expenses incurred by the successful party in the course of the proceedings. These costs include lawyers' fees, travel costs, photocopying costs, translation and interpretation costs, etc. In any case, in comparison to other national jurisdictions, they are low because the amount is fixed by a Royal decree⁷⁷. These legal costs are covered by the losing party through the payment of a lump-sum procedural indemnity (*indemnité de procédure* or *rechtsplegingsvergoeding*).

In 2022, this lump-sum procedural indemnity was the following:

En application de l'A.R. du 26 octobre 2007 fixant le taux des frais de justice visés à l'article 1022 du Code judiciaire			
Montants en €	Montant de base	Montant minimum	Montant maximum
< 250,01	225,00	112,50	450,00
< 750,01	300,00	187,50	750,00
< 2500,01	600,00	300,00	1.500,00
< 5000,01	975,00	562,50	2.250,00
< 10.000,01	1.350,00	750,00	3.000,00
< 20.000,01	1.650,00	937,50	3.750,00
< 40.000,01	3.000,00	1.500,00	6.000,00
< 60.000,01	3.750,00	1.500,00	7.500,00
< 100.000,01	4.500,00	1.500,00	9.000,00
< 250.000,01	7.500,00	1.500,00	15.000,00
< 500.000,01	10.500,00	1.500,00	21.000,00
< 1.000.000,01	15.000,00	1.500,00	30.000,00
> 1.000.000,01	22.500,00	1.500,00	45.000,00
litige non évaluable en argent	1.800,00	112,50	15.000,00
pension alimentaire	montant à recevoir = montant d'une annuité		

⁷⁶ *Ibidem*, Article 1.

⁷⁷ Arrêté royal fixant le tarif des indemnités de procédure visées à l'article 1022 du Code judiciaire et fixant la date d'entrée en vigueur des articles 1^{er} à 13 de la loi du 21 avril 2007 relative à la répétibilité des honoraires et des frais d'avocat, le 26 octobre 2007.

Remedies

14. In case the reply to questions 4 and/or 5 is yes, what remedies are available to non-competitor applicants before an administrative body (if any) or a court in case of breach of environmental law by an aid measure or by the activity?

Regarding the Law of 12 January 1993 on a right of action for the protection of the environment, the president of the court of first instance may order the cessation of acts that have begun to be carried out or impose measures to prevent the execution of such acts or to prevent damage to the environment. Before any discussion of the merits of the case, an attempt at conciliation will be made. The president may grant the offender time to comply with the measures ordered.

Transparency

15. How can third parties find out about possible planned, unlawful or incompatible State aid from official sources? Are there national registers? What publicity is given to the granting of aid and to its notification to the EU Commission?

Belgium has no database for State aid granted by itself. Nevertheless, the European Commission has developed a database (State Aid Transparency), which aims to give an full access to all State aid granted by each Member State.

It must be noted that this database only gathers the granted State aid measures higher than 500.000 euros.

[Recherche publique dans la base de données des aides d'État Transparency \(europa.eu\)](#)

Moreover, regarding aid measures covered by the GBER (Articles 9, 10 and 11)⁷⁸, Member States must publish the aid or aid scheme on the Official Journal.

16. Please provide details of any national legislation that gives third parties access to documents on State aid granted to beneficiaries that are held by national public authorities.

In Belgium, the right of access to information on State aid granted to beneficiaries held by the national public authorities is governed by the law of 11 April 1994⁷⁹ on the publicity of the administration

Regional legislation applies for regions in a similar manner.

- For the French Community of Brussels the décret et ordonnance conjoints de la Région de Bruxelles-Capitale, la Commission communautaire commune et la Commission communautaire française, relatifs à la publicité de l'administration dans les institutions bruxelloises of the 16 May 2019.

- For the Flemish Region, the Decreet betreffende de openbaarheid van bestuur, 26 MAART 2004.

⁷⁸ Commission Regulation (EU) n° 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty, the 26 June 2014, Articles 9, 10 et 11.

⁷⁹ Law of 11 April 1994 on the publicity of the administration, Belgian Official Journal.

- For the Walloon Region, the Décret relatif à la publicité de l'Administration, 30 mars 1995.

This law implements the principle of transparency and the right of access to information on the activities of public authorities, including State aid.

Any person, including third parties, has the right to access documents held by national public authorities and local authorities, which concern State aid granted to beneficiaries, according to articles 4 to 6 of the law of 11 April 1994.

To gain access to such documents, interested parties may submit a written request to the public authority concerned. The request must specify the documents or information sought and indicate the name and address of the applicant. The public authority must respond to the request within a maximum of 30 days and may refuse access to the requested documents only in limited circumstances, such as when disclosure of the information would undermine the protection of public safety or the confidentiality of commercial or industrial information.

Bibliography

Public consultations websites

- Results of the public consultation on the National Energy and Climate Plan are available | Belgium.be. www.belgium.be, “Results of the public consultation on the National Energy and Climate Plan are available”
- NEKP | Vlot en veilig mobiliteitssysteem (plannationalenergieclimat.be).
- Organiser des consultations populaires communales et provinciales (wallonie.be). www.wallonie.be, “Organiser des consultations populaires communales et provinciales”
- Geef uw mening over nieuwe beleidsvoorstellen | Vlaanderen.be. www.vlaanderen.be, “Geef uw mening over nieuwe beleidsvoorstellen”

Judgments:

Court of Justice of the European Union:

- CJEU, 18 December 1997, C-129/96, *Inter-environnement Wallonie*, EU:C:1997:628

Official websites:

- Study on the enforcement of State aid rules and decisions by national courts, Country reports Belgium by the European Commission.

Academia:

- JESTAEDT T., DERENNE J., OTTERVANGER T., *Study on the enforcement of State aid law at national level*, 2006, available on https://ec.europa.eu/competition/state_aid/studies_reports/study_part_1.pdf
- DERENNE J., *Update of the 2006 Study on the Enforcement of State Aid Law at National Level*, 2009, available on https://ec.europa.eu/competition/state_aid/studies_reports/enforcement_study_2009.pdf
- DERENNE J., MÜLLER-RAPPARD A., KACZMAREK C., *Enforcement of EU State aid rules at national level – 2010 – Reports from the 27 Member States*, 2010, Lexxion (annexes)
- DERENNE J., BARBU-O’CONNOR C., CHILARU C., *Remedies in EU Competition Law: Substance, Process and Policy*, 2020, Kluwer Law International (annexes)
- DERENNE J., BARBU-O’CONNOR C., “State aid and private enforcement: An overview of EU and national case law”, 2020, *Concurrences* (annexes)
- DERENNE J., JOUVE D., “State aid and private enforcement: An overview of EU and national case law”, 2023, *Concurrences* (annexes)

Bulgaria

Context

- 1. Have the public authorities or national courts in the Member State expressed any public opinion or issued any ruling referring to the application of the *Austria v. Commission (Hinkley Point C)* judgment and its implications at national level (e.g. on checks to be performed before or after granting aid, interactions with the EU Commission, or access to justice rules or practices)? If yes, please provide a short summary as well as a reference to where this public opinions or judgements can be accessed.**

Our research revealed neither statements or opinions expressed by Bulgarian public authorities, nor judgements rendered by Bulgarian courts, that specifically addressed or otherwise referred to the application of the Court of European Union (“**CJEU**”)’s judgement in case C-594/18 P *Austria v. Commission (Hinkley Point C)*.

As part of our research on this question, we have conducted targeted searches by key words in Bulgarian and English languages (e.g. „дело C-594/18 P“, „C-594/18 P“, “Austria v. Commission (Hinkley Point C)”, „Хинкли Пойнт“), as follows:

- In two specialised legal databases⁸⁰ containing (i) legal acts that are issued by Bulgarian public authorities and are subject to promulgation, and (ii) judgements rendered by Bulgarian courts;
- Of all official announcements made by the Bulgarian Ministry of Finance and its Directorate “State aid and Real Sector”⁸¹ since 22 September 2020 (when the CJEU rendered its judgement in case C-594/18 P);⁸²
- Of all activities reports and other reports by Directorate “State aid and Real Sector” of the Bulgarian Ministry of Finance that have been made public since 22 September 2020;⁸³
- On the web-site of the Ministry of Finance through the search function of the web-site;
- Through general searches on the Internet regarding any possible statements, opinions, administrative acts, publications issued by Bulgarian public authorities or judgments rendered by Bulgarian courts.

⁸⁰ The web-based versions of Apis and Ciela, available respectively at: web.apis.bg/ and <https://web7.ciela.net> . Access to both databases is paid, although they are widely used by legal professionals (e.g. private practitioners, judges, attorneys-at-law) in Bulgaria. However, no publicly accessible, free-of-charge database exists that collides and contains case-law of Bulgarian courts and administrative authorities.

⁸¹ The Ministry of Finance is the public authority in charge of overseeing the compliance of State aid grantors and beneficiaries with the European Union and the Bulgarian State aid laws. It is also the authority clearing aid measures that do not fall within the exclusive competence of the European Commission (e.g. *de minimis* aid). The Ministry of Finance fulfills those functions through its Directorate “State aid and Real Sector”. The Directorate maintains its own germandatabases, issues separate reports and makes separate statements to the public on matters of relevance.

⁸² In the “News” sections available here: <https://www.minfin.bg/bg/news> and <https://stateaid.minfin.bg/bg/news>

⁸³ Available here: <https://stateaid.minfin.bg/bg/435>.

2. Are public consultations organised at national or local level on planned aid measures or schemes? Please specify if this includes all or only certain planned measures or schemes and whether these consultations are open to participation by environmental NGOs. Please provide recent examples of such consultations with the references to the relevant websites.

Bespoke public consultations regarding specific planned State aid measures or schemes are typically not organised at national or local level in Bulgaria. Staging such public consultations as a matter of ensuring the transparency of a grant of aid is not required under the Bulgarian State aid legislation.⁸⁴

Planned State aid measures and schemes may, however, undergo public consultations when they form part of draft legislation or draft administrative acts that the Bulgarian Council of Ministers or a municipality announces and subjects to public consultation. The latter would cover by extension the anticipated aid measures or schemes too. Recent examples of such public consultations include Council of Ministers' decree instituting State aid schemes for support of individuals or entities affected by the Covid-19 pandemics.⁸⁵

Public consultations regarding draft legislation or administrative acts of the Council of Ministers or municipalities are open to participation by environmental NGOs as well. Such consultations are announced and carried out through:

- The Bulgarian government's portal for public consultations accessible here: <https://www.strategy.bg/Default.aspx?lang=bg-BG>; or
- Typically, the website of the municipality adopting the respective administrative act (e.g. for Sofia Municipality at <https://www.sofia.bg/public-discussions>, and for the Stara Zagora Municipality at <https://www.starozagorci.com/newstags-1513.html>).

Acts of other public authorities (e.g. governmental agencies) that entail the award of State aid typically do not undergo public consultations.

Standing

3. Which of the administrative or civil courts are competent to challenge government measures in court for alleged illegal State aid and for asking remedies (including suspension, recovery of aid and damages)? Do the rules differ (and how) between administrative and civil courts?

Administrative courts are competent to review and adjudicate on challenges of illegal State aid.

The Bulgarian State aid legislation recognizes to "*any interested third party*" legal standing to challenge the award of alleged illegal State aid and to seek remedies (including

⁸⁴ The State Aid Act promulgated in the Bulgarian State Gazette, issue No. 85 of 24.10.2017, last amendments promulgated in State Gazette No. 102 of 23.12.2022, hereinafter referred to the "**Bulgarian State Aid Act**".

⁸⁵ To that effect, for example, a public consultation regarding a State aid scheme for support of individuals unable to work due to the Covid-19 pandemics accessible here: <https://www.strategy.bg/StrategicDocuments/View.aspx?lang=bg-BG&Id=1336>

suspension, recovery and/or damages). An entity is regarded to qualify as an “*interested party*” as long as the award of State aid affects interests pertaining to the entity’s activities.⁸⁶

Hence, any governmental agency or other administrative authority would in principle be entitled to challenge the award of alleged illegal State aid and seek remedies as long as that authority or agency (i) is not the aid grantor, and (ii) can substantiate impairments of legitimate interest pertaining to its activities as a result of the award of alleged illegal State aid. Such would be the case, for example, when an administrative authority or a governmental agency oversees as a matter of course the activities of an aid grantor, disagrees with – and decides to challenge – an award by the grantor of aid (as in the case described in the response to question 12 below).

Bulgarian prosecutors may also challenge the award of alleged illegal State aid when it actually or potentially hampers the public interest.⁸⁷

Bulgarian courts are not mandated to challenge the award of alleged illegal State aid. The rules in this respect do not differ depending on the type of court (civil or administrative). Within the framework of the Bulgarian legal system, courts fulfill merely adjudicatory functions, i.e. hear and decide upon complaints and prosecutors’ protests. Courts do not have prosecutorial-type-of powers.

For further analysis of the legal standing of undertakings to challenge the award of illegal State aid, please refer to the response to question 4 below.

4. Have national courts recognised standing of parties whose competitive position is not affected by the grant of illegal aid? Please reply with “yes”, “no” or “unclear”. If the reply is “yes”, please also specify whether the national courts applied the EU General Court ruling in *Streekgewest Westelijk Noord-Brabant v Staatssecretaris van Financien (C-174/02, paragraph 19)* – or have developed their own jurisprudence.

Unclear. To date, the existing case-law on legal standing in challenges to illegal State aid under the Bulgarian State aid legislation is extremely limited and essentially entails only two cases⁸⁸ when the competent courts adjudicated on legal standing specifically. Both cases concern the legal standing of complainants that were competitors to the alleged aid beneficiaries and whose competitive position was allegedly affected by the award of the State aid measure under review.

In only one of these cases, the court specifically dealt with the criteria for recognising legal standing of competitors as part of its preliminary review for admissibility of the complainant’s motion.⁸⁹ In the court’s preliminary views, an undertaking that operates on the same market as the aid beneficiary and could generally be considered to be the latter’s competitor has legal standing to challenge the State aid to that beneficiary only as long as

⁸⁶ Pursuant to Art. 54(1) of the Bulgarian State Aid Act.

⁸⁷ Pursuant to Art. 54(3) of the Bulgarian State Aid Act.

⁸⁸ Ruling No. 755 of 28.01.2022 of Sofia City Administrative Court in administrative case No. 8264/2018, and Judgement No. 264 of 21.2.2022 of Sliven Administrative Court in administrative case No. 230/2022. Both available through the Apis and Ciela specialised legal databases referred to above.

⁸⁹ Ruling No. 755 of 28.01.2022 of Sofia City Administrative Court in administrative case No. 8264/2018.

the award of the aid directly and specifically affected the competitive position of the complainant. The complainant's mere capacity of a competitor to the aid beneficiary was considered insufficient to ground the complainant's legal standing in the case.

Absent any specific court precedents specifically recognizing the legal standing of parties whose competitive position is not affected by the grant of illegal State aid, the statutory test described in the first paragraph of the response to question 3 above would in principle apply. However, the court ruling summarised in the preceding paragraph to this response suggests that this statutory test could be interpreted narrowly, to exclude anyone (including competitors) whose competitive position is not directly and specifically affected by the challenged State aid measure or, for that matter, has no competitive position because it operates no economic activities.

5. **If the answer to question 4 is “yes”, do environmental NGOs have standing before national administrative bodies (if any) or courts competent in State aid matters to challenge government measures for alleged illegal State aid? Please reply with “yes”, “no” or “unclear”.**

The reply to this question is 'unclear' in light of the response to question 4 above.

6. **If the answer to question 5 is “yes”, which criteria do NGOs need to fulfil to be granted standing (some examples of criteria may include registration / accreditation with a specific body; number of members; certain period of existence; requirements as to its statutory purpose or form of incorporation; relationship between its activities and the aid challenged etc.)? Are the criteria different for foreign NGOs (i.e. not registered in the country where the aid is challenged)?**

The question is not applicable in light of the response to question 4 above.

7. **Has an NGO with an environmental object previously brought an action against a State aid measure or scheme in the Member State and been recognised by the courts as being entitled to do so? Please reply with “yes” or “no”. If the answer is “yes”, please also detail the context and the outcome of the judgement(s) concerned (admissibility and merits of the action).**

Based on the existing case-law concerning challenges to awards of State aid under the Bulgarian State aid legislation, no.

8. **Have national courts already relied on / referred to point 27 of the revised Commission's Notice on the enforcement of State aid law by national courts recommending to grant standing to NGOs? Please reply, to the best of your knowledge, with “yes” or “no”. If yes, please also provide a short summary as well as a reference to where the relevant judgement can be accessed.**

Based on the information available to date in the two specialised legal databases that we have consulted, no.

Available grounds

9. **Can a claimant (any category) raise claims related to violations of EU or national environmental law by an aid measure or an activity in support of an action aiming at challenging the grant of aid? Please reply with “yes”, “no” or “no data”.**

In principle, yes, as long as such claims substantiate or otherwise relate to the subject-matter of the action challenging the grant of the aid under the Bulgarian State aid legislation. Such could hypothetically be the case when a claimant invokes EU or national environmental laws in order to substantiate why a measure constitutes a competitive advantage and, thus, aid to a particular (group of) undertaking(s) in the first place (for example, in cases of an undertaking’s failure to meet applicable environmental standards and competent regulatory agency’s omission to enforce such standards and/or to sanction the undertaking’s non-compliance).

10. **Are there examples of cases where such claims were raised (if so please detail the context and outcome)?**

Based on the information available to date in the two specialised legal databases that we have consulted, no.

11. **More generally, are there instances of claimants (any category) alleging, in support of an action challenging an aid measure or scheme, that a State aid measure or activity breached EU or national law that is not directly State aid law (other than environmental law, which is covered by question 9 above, such as law on public procurements, planning law, tax law etc.)? Please detail the context and the outcome (competence of the courts, merits of the claim and potential test applied by the court, potential reference for preliminary ruling to the CJEU under Article 267 TFEU)?**

Our case-law research yielded two such relevant instances to date:

- ***Alleged breach of the requirements under the Bulgarian civil aviation legislation that airport charges are collected from air carriers using the infrastructure or respective services of an airport:*** The Bulgarian civil aviation legislation mandates the collection of airport charges from air carriers utilizing the infrastructure and/or ground-handling services of the airports where they land and take off. In implementation of that requirement, a local regulatory agency determines the amounts of the various airport charges due. The respective airports collect the charges in the amounts determined. At the time of the complaint, the Sofia Airport was operated by the Bulgarian state, represented by the Bulgarian Minister of Transport. The airport charges due to the Sofia Airport qualified as public receivables.⁹⁰ The claimant in the case – an air carrier – appeared to allege that the Minister of Transport granted illegal State aid to a competing airline by signing an agreement with the latter that postponed and rescheduled the collection of airport charges due by the competitor. The competent court – the Sofia City Administrative

⁹⁰ Art. 120 et seq. of the Act on Civil Aviation, promulgated in State Gazette No. 94 of 1.12.1972, last amendments promulgated in State Gazette No. 2 of 23.12.2022. These statutory provisions implement Directive 2009/12/EC of the European Parliament and of the Council of 11 March 2009 on airport charges, OJ L 70, 14.3.2009, p. 11–16.

Court – conducted an initial review of the claimant’s complaint for its admissibility and considered the complaint incomplete on several counts. Most notably, the complaint did not sufficiently substantiate the complainant’s legal standing, in particular how the rescheduling of the airport charges due by the competitor directly and adversely affected the complainant’s interests. Furthermore, the complaint did not appear to sufficiently specify the aid grantor and the specific act from which the aid arose. The court instructed the complainant to remedy those (and other) deficiencies of its complaints.⁹¹ As of the moment, the case appears to still be pending and no request for preliminary ruling by the CJEU appears to have been submitted.⁹²

- ***Breach of the national legislation instituting temporary legislative, administrative and economic measures in support of various economic sectors when overcoming the consequences from the COVID-19 pandemics.***⁹³ One such measure introduced a State aid scheme in support of tour operators and charter airlines. The scheme provided for a fixed subsidy per airplane seat filled by a customer of tourist services to be provided in Bulgaria. The specific substantive and procedural requirements for granting the subsidy were detailed in guidelines issued by the Bulgarian Minister of Tourism.⁹⁴ The complainant in the case – a German tour operator – challenged the refusal of the Bulgarian Minister of Tourism to grant aid to the claimant. The competent court – the Sofia City Administrative Court – admitted the complaint as submitted by an interested party, without providing further reasoning as to the dimensions of the complainant’s legal standing or applicable tests thereof. The court upheld the Minister’s refusal on grounds that the claimant’s aid application did not meet certain formal substantive and procedural requirements under the guidelines for application of the State aid scheme (e.g. the application had not been duly signed, incomplete supporting documentation had been provided).⁹⁵ The court did not submit a request for preliminary ruling to the CJEU.

12. Have there been any instances in the Member States of a national court referring the validity of a Commission’s State aid decision to the CJEU under Article 267 TFEU between 1 January 2019 and 31 December 2022?

Based on the information made available through the CJEU’s online search form, there has been one such instance for the reference period above, namely in Case C-325/22. The request for preliminary ruling concerns the application of Commission Decision (EU) 2015/456 of 5 September 2014 on the aid scheme No SA.26212 (11/C) (ex 11/NN – ex CP 176/A/08) and SA.26217 (11/C) (ex 11/NN – ex CP 176/B/08) implemented by the Republic of Bulgaria in the context of swaps of forest land (notified under document C(2014) 6207).⁹⁶

⁹¹ Ruling No. 755 of 28.01.2022 of Sofia City Administrative Court in administrative case No. 8264/2018.

⁹² Based on checks conducted on Sofia City Administrative Court’s public online database of judgements and in the two specialised legal databases referred above.

⁹³ Pursuant to Art. 26(1) of the Act on the Measures and Actions during the State of Emergency Declared by a Resolution of the National Assembly of 13 March 2020 and on Addressing the Consequences, promulgated in the Bulgarian State Gazette No. 28 of 24.03.2020, last amendments promulgated in State Gazette No. 53 of 8.7.2022.

⁹⁴ Order No. T-ПД-04-02/29.03.2022 of the Minister of Tourism approving Guidelines for applying for grant of aid under State aid scheme Phase III.

⁹⁵ Judgment No. 7998 of 23.12.2022 of the Sofia City Administrative Court in administrative case No. 6893/2022.

⁹⁶ OJ 2015 L 80, p. 100.

Further information regarding the questions referred is available here: <https://curia.europa.eu/juris/document/document.jsf?text=&docid=263958&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=2952575> .

Procedural costs risks

13. If the answer to question 5 is “yes”, what are the procedural costs and potential adverse costs to be incurred by an NGO for bringing a State aid-related action before a national court, both in case the challenge is ultimately successful and if it unsuccessful?

The question is not applicable in light of the response to question 4 above. However, court fees are in principle due by complainants (including NGOs) for lodging legal actions in Bulgaria. When an NGO lodges an appeal against an administrative act, a flat court fee applies. Its amount is BGN 10 (approximately EUR 5) for appeals at first instances and BGN 5 (approximately EUR 2.5) for appeals at cassation.⁹⁷ When an NGO seeks from an aid beneficiary compensation for damages incurred, a percentage-based fee is due. At first instance, it amounts to four percent of the monetary equivalent of the damages claimed. At cassation, the fee mounts to 2 percent.⁹⁸

Further information regarding the court fees due in lawsuits in Bulgarian can be found in:

- The tariffs of court fees due in administrative cases, available in Bulgarian language here: <https://lex.bg/laws/ldoc/-14643200> ;
- The tariffs of court fees due in civil cases, available in Bulgarian language here: <https://lex.bg/laws/ldoc/2135581301>.

In addition to court fees due and in both cases above, an NGO may be ordered to cover the legal costs (e.g. lawyers' fees) of the opposing party if the NGO's lawsuit does not succeed. The amount of legal costs assigned in this way is determined by the court hearing the case and varies from case to case.

Remedies

14. In case the reply to questions 4 and/or 5 is yes, what remedies are available to non-competitor applicants before an administrative body (if any) or a court in case of breach of environmental law by an aid measure or by the activity?

The question is not applicable in light of the response to question 4 above.

⁹⁷ Pursuant to Section A, it. 2b, a) of Tariff No. 1 to the Act on the State Fees Collected by the Courts, the Prosecution Office, the Investigatory Office and the Ministry of Justice, promulgated in State Gazette No. 71 of 1.09.1992, last amendments promulgated in State Gazette No. 20 of 11.03.2022.

⁹⁸ Pursuant to Art. 1 of the Tariffs of the Fees Collected by Courts under the Civil Procedural Code, promulgated in State Gazette No. 22 of 28.02.2008, last amendments promulgated in State Gazette No. 35 of 2.05.2017.

Transparency

15. How can third parties find out about possible planned, illegal or incompatible State aid from official sources? Are there national registers? What publicity is given to the granting of aid and to its notification to the EU Commission?

No public registries of *planned* State aid measures or schemes are being maintained in Bulgaria. Generic information regarding such measures could at times be gathered through monitoring general and business media sources.

No bespoke registries are being maintained in Bulgaria regarding State aid measures or schemes *notified* to the European Commission. The online database of pending cases that Directorate General for Competitions at the European Commission maintains on its website is the reliable source of information as far as such cases are concerned.

Several governmental agencies maintain registries regarding *granted* aid, typically through schemes, in areas/economic sectors within the respective agency's purview. The maintenance of those registries is mandated by the Bulgarian State aid law but they essentially also include aid measures covered by the General Block Exemption Regulation concerning State aid (e.g. *de minimis*).⁹⁹ Relevant examples to that effect include:

- The registry of approved State aid that the Bulgarian Ministry of Tourism maintains and is available here: <https://www.tourism.government.bg/bg/kategorii/registri-na-durzhavnite-pomoshti/registri-na-durzhavnite-pomoshti> ;
- The registry of granted and *de minimis* State aid that the Bulgarian Small and Medium Sized Enterprises Promotion Agency maintains and is available here: https://www.sme.government.bg/?page_id=23 ;
- The registry of granted and *de minimis* State aid that the Agriculture Fund maintains and is available here: <https://seu.dfz.bg/seu/f?p=727:8100:::NO::>

Further information regarding individual aid measures could at times be gathered again through monitoring the mass and specialised business media.

No central public registry of all State aid measures planned, in the process of approval or granted, however, exists in Bulgaria.

16. Please provide details of any national legislation that gives third parties access to documents on State aid granted to beneficiaries that are held by national public authorities.

Third parties may request access to documents that are in the possession of public authorities and concern the grant of State aid through the domestic freedom of information legislation.¹⁰⁰ It provides for such a possibility for individuals and legal entities, including

⁹⁹ Commission Regulation (EU) No 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty Text with EEA relevance, OJ L 187, 26.6.2014, p. 1–78.

¹⁰⁰ The Bulgarian Act on the Access to Public Information, promulgated in State Gazette No. 55 of 7.07.2000, last amendments promulgated in State Gazette No. 15 of 22.02.2022, hereinafter referred to the "Access to Public information Act".

NGOs.¹⁰¹ The information that may be requested includes any data and documents concerning public matters (e.g. administration, economics, public authorities' activities and acts).¹⁰²

Access to such information needs to be formally requested.¹⁰³ Such requests are submitted through the Platform for Access to Public Information maintained by the Bulgarian Ministry of Electronic Governance¹⁰⁴ or by e-mail to the respective public authority supposedly holding the information.¹⁰⁵ Access must in principle be granted unless it is subject to specific limitations (e.g. the information is classified, constitutes trade secret, concerns preliminary positions considered or the inner workings of a public authority, or may affect third parties' interests).¹⁰⁶ A public authority's refusal to grant access to public information in its possession may be appealed before the Bulgarian administrative court that reviews the legality of acts of this particular authority.¹⁰⁷

¹⁰¹ Pursuant to Art. 4 of the Access to Public Information Act.

¹⁰² Pursuant to Art. 2, 9 and 12 of the Access to Public Information Act.

¹⁰³ Pursuant to Art. 24 of the Access to Public Information Act.

¹⁰⁴ Available here: <https://pitay.government.bg/PDoiExt/>

¹⁰⁵ Pursuant to Art. 15(1), it. 4 of the Access to Public Information Act.

¹⁰⁶ Pursuant to Art. 6, 7 and 13 et seq. of the Access to Public Information Act.

¹⁰⁷ Pursuant to Art. 40 of the Access to Public Information Act.

France

Context

- 1. Have the public authorities or national courts in the Member State expressed any public opinion or issued any ruling referring to the application of the Austria v. Commission (Hinkley Point C) judgment and its implications at national level (e.g. on checks to be performed before or after granting aid, interactions with the EU Commission, or access to justice rules or practices)? If yes, please provide a short summary as well as a reference to where this public opinions or judgements can be accessed.**

We are not aware of any such publicly made comments or rulings. This case law is not cited or referred to by the French Council of State nor the French Supreme Court¹⁰⁸.

- 2. Are public consultations organised at national or local level on planned aid measures or schemes? Please specify if this includes all or only certain planned measures or schemes and whether these consultations are open to participation by environmental NGOs. Please provide recent examples of such consultations with the references to the relevant websites.**

Yes, it may happen that aid schemes are open to public consultation. These consultations are open to environmental NGOs. This is not systematic, however.

The consultations are opened on websites by of the State, national public establishments or local authorities. Pursuant to Article 16 of Law No. 2011-525 of 17 May 2011 on simplifying and improving the quality of law, the State and its public establishments may, prior to the adoption of a regulatory act, consult people on the Internet about a draft normative text, instead of involving consultative commissions provided for by law or regulation.

This was the case for the New Economic Regulation of existing nuclear power (ARENH) where several NGOs gave opinions¹⁰⁹. In the case of public services in particular, public authorities should carry out a public consultation or other appropriate procedure to take account of the interests of users and service providers¹¹⁰.

¹⁰⁸ In France, the organisation of justice comprises two orders: judicial and administrative. The judicial courts rule on disputes between private persons. The administrative courts decide on disputes between individuals and the administration. Respectively, there is the Cour de Cassation and the Conseil d'Etat at the head of each legal order.

¹⁰⁹ In this case, for exemple the AFIEG (Association Française d'Electricité et du Gaz) published its contribution. It was also the case of the French NGO QuiEstVert.

¹¹⁰ Ministère de l'économie et des finances, Vade-mecum des aides d'État - Édition 2020.

Standing

- 3. Which of the administrative or civil courts are competent to challenge government measures in court for alleged unlawful State aid and for asking remedies (including suspension, recovery of aid and damages)? Do the rules differ (and how) between administrative and civil courts?**

In France, administrative courts have jurisdiction to deal with these issues. Where a court finds that a measure constituting State aid has not been notified or has been put into effect before obtaining the Commission's approval, it must, in principle, order the full recovery of the aid, together with interests.

The Conseil d'Etat has further ruled that when it has annulled a regulatory act instituting aid in disregard of the obligation of prior notification to the European Commission, it is incumbent on the State to take all necessary measures to ensure the recovery from the beneficiaries of the aid, as the case may be, of the aid paid on the basis of this unlawful scheme or of the interest calculated over the period of unlawfulness.

Where unlawful aid is about to be paid, the national court must, after finding that the granting measure is invalid because of an infringement of Article 108(3) TFEU, prevent the payment of the aid.

Where the national court is satisfied that a measure constitutes *prima facie* unlawful aid, it must assess the need to order interim measures, pending its judgment on the substance of the case, e.g. where it has requested clarification from the Commission. In this case, if the aid has been paid, the Commission considers that the most appropriate solution is to order that the aid and interest be deposited in a blocked account until the national court has ruled on the substance of the case.

If the aid has not been paid, the court may suspend its payment by an interim order. The Council of State has used its emergency powers to suspend the payment of aid measures that should have been notified to the Commission.

- 4. Have national courts recognised standing of parties whose competitive position is not affected by the grant of unlawful aid? Please reply with “yes”, “no” or “unclear”. If the reply is “yes”, please also specify whether the national courts applied the EU General Court ruling in *Streekgewest Westelijk Noord-Brabant v Staatssecretaris van Financien* (C-174/02, paragraph 19) – or have developed their own jurisprudence**

Unclear. We are not aware of decisions granting standing to non-competitors who were not themselves addressee of the measure.

Sometimes the administrative courts decide whether or not there is aid, taking into account the consequences of some measures on the competitors. This is particularly the case in the electricity market.

In a very recent judgement, the Council of State, upon an action by EDF and employee and shareholder organisations, ruled that the Government's decision to increase the volume of electricity sold by EDF to its competitors in 2022 under the ARENH is legal. Taken in an exceptional context to contain price increases, the Council of State considered that this measure is not excessive to achieve the objectives of free choice of supplier and

price stability, that it does not disproportionately affect EDF's freedom of enterprise and that it does not infringe European Union law.¹¹¹

5. If the answer to question 4 is “yes”, do environmental NGOs have standing before national administrative bodies (if any) or courts competent in State aid matters to challenge government measures for alleged unlawful State aid? Please reply with “yes”, “no” or “unclear”.

Answer to question 4 is no/unclear.

Nonetheless, there are several examples of case law that have elucidated the notion of standing of NGOs before the administrative judge, although not in State aid-related matters. Here are several examples:

- An environmental NGO cannot have a stated purpose that is too vague with regards to the scope of the decision it is seeking the annulment of (CE, 27 mai 1991, n° 113203 ; CE, 29 janvier 2003, n° 199692).
- It cannot be too specific either (CAA Lyon, 3 mai 2016, n°14LY00473).
- The geographical scope of the NGO has to be precisely defined as well (CE, 20 mars 1974, n° 90212 ; CE, 31 décembre 1976, n° 03164).

6. If the answer to question 5 is “yes”, which criteria do NGOs need to fulfil to be granted standing (some examples of criteria may include registration / accreditation with a specific body; number of members; certain period of existence; requirements as to its statutory purpose or form of incorporation; relationship between its activities and the aid challenged etc.)? Are the criteria different for foreign NGOs (i.e. not registered in the country where the aid is challenged)?

The most common, and by far, type of environmental NGO is an “approved environmental protection association” (or “associations agréées de protection de l'environnement” in French). These associations are granted standing in front of civil, administrative, and criminal courts in environmental matters.

First, an association must be formed. The legal requirements for such an association, set out in the Law of 1901, are as follows:

1. At least two people need to be involved;
2. By-laws need to be drafted. The by-laws need to include information such as the purpose and goals of the entity, the names, addresses, and dates of birth of the members of the board of directors, and the modalities of the general assembly that controls the association. These by-laws do not need to be extensive, and many templates are provided as there are over 1,5 million associations of this kind in France;
3. The seat of the association needs to be declared. This is as simple as stating a commune in France;
4. Have a non-lucrative goal;
5. Register the association and its by-laws with the French authorities. A tax of EUR 44 needs to be paid. Whenever there are substantial modifications to the statutes, and changes to the membership of the board of directors, these changes need to be declared to the authorities.

¹¹¹ Conseil d'État, 3 février 2023, Decision n° 462840, FR:CECHR:2023:462840.20230203.

The French environmental code creates the possibility for “approved environmental protection associations” (henceforth “AEPAs” for simplicity). These associations are uniquely qualified as they are granted standing much more easily in front of administrative courts. To be considered as having standing in front of the civil and criminal courts, an NGO must have this particular designation. Otherwise they will not be considered. The legal requirements are listed in the Article L141-1 of the environmental code and are as follows:

1. Be an active association for at least three years;
2. Are declared and registered with the French authorities as an association whose goal and purpose is the defense of the environment, protection of nature, animals, natural resources, and objectives such as the prevention of pollution and are in general oriented towards environmental protection;
3. If the association fulfills these requirements, the French Council of State will grant them the status of AEPA by decree. If the association no longer, for whatever reason, fulfills this criteria, the status will be revoked.

An unregistered foreign NGO in the same area of activity will not be granted standing. The preferred route will be the creation of a “mirror” association in France.

- 7. Has an NGO with an environmental object previously brought an action against a State aid measure or scheme in the Member State and been recognised by the courts as being entitled to do so? Please reply with “yes” or “no”. If the answer is “yes”, please also detail the context and the outcome of the judgement(s) concerned (admissibility and merits of the action).**

No. We are not aware of such actions.

- 8. Have national courts already relied on / referred to point 27 of the revised Commission’s Notice on the enforcement of State aid law by national courts recommending to grant standing to NGOs? Please reply, to the best of your knowledge, with “yes” or “no”. If yes, please also provide a short summary as well as a reference to where the relevant judgement can be accessed.**

No. We are not aware of such decisions.

Available grounds

- 9. Can a claimant (any category) raise claims related to violations of EU or national environmental law by an aid measure or an activity in support of an action aiming at challenging the grant of aid? Please reply with “yes”, “no” or “no data”.**

No data. We are not aware of such claims.

- 10. Are there examples of cases where such claims were raised (if so please detail the context and outcome)?**

No data.

11. More generally, are there instances of claimants (any category) alleging, in support of an action challenging an aid measure or scheme, that a State aid measure or activity breached EU or national law that is not directly State aid law (other than environmental law, which is covered by question 9 above, such as law on public procurements, planning law, tax law etc.)? Please detail the context and the outcome (competence of the courts, merits of the claim and potential test applied by the court, potential reference for preliminary ruling to the CJEU under Article 267 TFEU)?

No. We are not aware of such claims.

12. Have there been any instances in the Member States of a national court referring the validity of a Commission's State aid decision to the CJEU under Article 267 TFEU between 1 January 2019 and 31 December 2022?

No, we are not aware of such references.

Procedural costs risks

13. If the answer to question 5 is "yes", what are the procedural costs and potential adverse costs to be incurred by an NGO for bringing a State aid-related action before a national court, both in case the challenge is ultimately successful and if it unsuccessful?

French law provides a precise framework for legal action before both administrative and civil courts.

Fixed legal costs for litigants in civil proceedings:

In civil matters, there are legally essential costs necessary for the prosecution of a trial, and the amount of which is subject to a pricing system either through regulatory means or by judicial decision. These costs are referred to as "depens."

They include:

- Translation fees for documents when required by law or international commitments;
- Compensation for witnesses;
- Payment to technicians;
- Tariffed expenses (tariff of bailiffs, advocates, lawyers);
- Emoluments of public or ministerial officers;
- Compensation for lawyers to the extent that it is regulated, including pleading fees;
- Costs incurred by the notification of an act abroad;
- Interpretation and translation costs made necessary by investigative measures carried out abroad at the request of courts under Council Regulation (EC) No 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters.

The costs of civil litigation include all amounts disbursed or due by the parties before or during legal proceedings. For example, before the start of the trial, costs may include fees for legal advice, technical advice, and travel expenses.

During the proceedings, these costs may include procedural costs paid to legal assistants, ministerial officers, fees paid to the state, and counsel fees.

After the trial, this may concern the costs of enforcing the decision.

The amount of aid being contested has no bearing on the costs of the procedure.

Legal costs in administrative litigation:

Although contentious proceedings before administrative courts are free, some costs may remain the responsibility of the litigants.

These costs are divided into:

- Depens;
- Expenses incurred not included in the depens.

The depens include:

- Costs of expertise related to an investigative measure ordered by the judge,
- Costs related to a request for technical advice (amicus curiae procedure provided for in Article R. 625-2 of the Code of Administrative Justice),
- Costs related to the investigation procedure: this procedure allows witnesses to be heard (Art. R. 623-1 et seq. of the Code of Administrative Justice). In this context, the witnesses heard may request the settlement of the compensation owed to them.

Expenses incurred not included in the depens mainly include:

- Lawyers' fees and, in general, consultancy costs,
- Travel expenses to attend the hearing,
- Postage, photocopying expenses,
- Bailiff and surveyor expenses incurred by a claimant and useful for the resolution of the dispute.

The losing party may be required to pay an amount determined by the judge for these costs (see Article L. 761-1 of the Code of Administrative Justice).

Remedies

14. In case the reply to questions 4 and/or 5 is yes, what remedies are available to non-competitor applicants before an administrative body (if any) or a court in case of breach of environmental law by an aid measure or by the activity?

Answer to questions 4 and 5 are no.

Transparency

15. How can third parties find out about possible planned, unlawful or incompatible State aid from official sources? Are there national registers? What publicity is given to the granting of aid and to its notification to the EU Commission?

The aid granted by the French State is published in the Official Journal of the French Republic mainly in the form of decrees or ministerial orders, indicating the disbursement of specific amounts. The aid notification can be the subject of press releases and appears in the general and economic press.

16. Please provide details of any national legislation that gives third parties access to documents on State aid granted to beneficiaries that are held by national public authorities.

In the sense of the law, the right of any person, whether a French citizen or not, to ask a public service to consult or obtain a copy of documents or information held by the said public service. The right of access covers administrative documents and environmental information. This measure aims to improve the transparency of public services.

Law No. 78-753 of 17 July 1978 established a right of access for citizens to administrative documents. Thus, any person may obtain communication of documents held by an administration as part of its public service mission, regardless of their form or medium. Its provisions have been specified in the code of relations between the public and the administration (Code des relations entre le public et l'administration).

Bibliography

Lois et codes

Code de l'environnement

Code de la justice administrative

Code de procédure civile

Loi du 1er juillet 1901 relative au contrat d'association

Loi n°2011-525 du 17 mai 2011 de simplification et d'amélioration de la qualité du droit

Manuels et Encyclopédies

Les Stratégies des ONG" ("NGO Strategies") available at:

<https://books.openedition.org/dice/9271?lang=en>

Vogel, Louis, Contrôle européen des aides d'état, Collection Lawlex, 2020.

Berrod, Frédérique, Aides : notion — Janvier 2008 (actualisation : Décembre 2022), Répertoire de droit européen, Encyclopédie Dalloz.

Petit, Yves, Environnement –Janvier 2007 (actualisation : Janvier 2023), Répertoire de droit européen, Encyclopédie Dalloz.

Moreau, Jacques, Moreau, Pierre, et Cazin, Bernard, Compétence : répartition entre le judiciaire et l'administratif - Répertoire de Contentieux administratif, Encyclopédie Dalloz.

Haïm, Victor, Frais de justice, Répertoire de Contentieux administratif, Encyclopédie Dalloz.

Publications institutionnelles

Ministère de l'économie et des finances, Vade-mecum des aides d'État - Édition 2020

Germany

Context

1. **Have the public authorities or national courts in the Member State expressed any public opinion or issued any ruling referring to the application of the *Austria v. Commission (Hinkley Point C)* judgment and its implications at national level (e.g. on checks to be performed before or after granting aid, interactions with the EU Commission, or access to justice rules or practices)? If yes, please provide a short summary as well as a reference to where this public opinions or judgements can be accessed.**

No, not to our knowledge.

2. **Are public consultations organised at national or local level on planned aid measures or schemes? Please specify if this includes all or only certain planned measures or schemes and whether these consultations are open to participation by environmental NGOs. Please provide recent examples of such consultations with the references to the relevant websites.**

In principle, there is no obligation or practice for the granting entities (at national or local level in Germany) to carry out a public consultation as regards a specific aid measure or scheme before its implementation.

Exceptions exist for specific areas where public consultation is required under EU law, such as State aid for broadband infrastructure.¹¹² While, in principle, all interested parties can participate in the public consultation, the consultation seeks to gather information solely on the specificities of the networks in the target area and thus does not address environmental topics. A list of planned measures (including the consultation documents) is currently available under <https://projekttraeger-breitband.de/publicOverview> (only accessible in German).

Under the revised 2022 Guidelines on State aid for climate, environmental protection and energy (“**CEEAG**”), public consultations will become mandatory for certain environmental aid measures. Since the relevant sections will only start to apply from 1 July 2023,¹¹³ we are not aware that such public consultations have already been carried out in Germany.

¹¹² See Article 52 et seq. GBER and Broadband Guidelines, paras. 78 et seq.

¹¹³ Cf., for instance, para. 98 CEEAG.

Standing

3. Which of the administrative or civil courts are competent to challenge government measures in court for alleged illegal State aid and for asking remedies (including suspension, recovery of aid and damages)? Do the rules differ (and how) between administrative and civil courts?

In Germany, both administrative and civil courts may be competent to rule on such claims. Whether it is for the administrative courts or the civil courts to decide on a State aid dispute depends on the nature of the dispute, and thus on the nature of the disputed measure, i. e. whether the aid is granted by a legislative or administrative act or a public contract on the one hand or in the form of a civil contract on the other hand. Broadly speaking, in disputes before the administrative courts, at least one of the parties is a public authority acting in its capacity as a public authority (as opposed to public authorities acting in the free market economy), whereas private law disputes involve two or more private persons (including public authorities acting as market economy participants).

While the question of granting State aid is a matter of public (funding) law, the authorities often choose to use instruments governed by private law when implementing State aid measures (e.g., loans, guarantees and capital injections). Accordingly, a situation may arise in which disputes concerning the question of **whether a measure can be granted** (public law) are dealt with by the administrative courts, whereas litigation regarding the **modalities of implementation** (private law) has to be brought before the civil courts (the so-called 'two-level' theory).¹¹⁴

If a claim is brought before a civil court, in the first instance it is heard at a regional court (*Landgericht*) or a district court (*Amtsgericht*), depending on value of the claim. All claims with a value above EUR 5,000 will be heard at a regional court.¹¹⁵ An appeal may be lodged with the competent higher regional court (*Oberlandesgericht*). Last instance judgments are rendered by the German Federal Court of Justice (*Bundesgerichtshof* – “**BGH**”) when the appeal on points of law has been admitted by the second instance court or the BGH grants a non-admission appeal.

If a case is brought before an administrative court, in the first instance it falls within the competence of a regional administrative court (*Verwaltungsgericht*). In the second instance, it is heard by the competent higher administrative court (*Oberverwaltungsgericht*), provided that the appeal fulfils the restrictive admission criteria of Sec. 124 of the Law on Administrative Court Proceedings (*Verwaltungsgerichtsordnung*). Ultimately, if the appeal to the last instance court is allowed, the case will be decided by the Federal Administrative Court (*Bundesverwaltungsgericht* – “**BVerwG**”).

The most important difference between German civil and administrative court proceedings related to State aid measures is the **burden of proof**. Broadly speaking, German administrative courts are based on the inquisitorial system, which means that it is not only up to the parties to present evidence, but it also the obligation of the court to investigate the case.¹¹⁶ German civil courts, on the other hand, are based on the adversarial system, where the court decides based on the evidence presented by the parties.¹¹⁷ Therefore, from a plaintiff's perspective, the administrative courts seem slightly more advantageous. However, the difference should not be overstated, given that before both courts the plaintiff

¹¹⁴ *Karpenstein/Dingemann*, in: Münchener Kommentar zum Wettbewerbsrecht, 4th edition 2022, Band 5, Teil 12. Beihilfenrückforderungen im deutschen Recht, para. 9.

¹¹⁵ Sec. 23 and 71 (1) Judicial Systems Act (*Gerichtsverfassungsgesetz*).

¹¹⁶ Sec. 86 (1) Law on Administrative Court Proceedings (*Verwaltungsgerichtsordnung*).

¹¹⁷ So-called principle of production of evidence (*Beibringungsgrundsatz*) which is a fundamental principle of the German civil procedure system; cf. BGH, Decision of 28 October 2009 – IV ZR 140/08, para. 30.

ultimately bears the risk of a non liquet situation. If the existence of aid cannot be proven (by the plaintiff and/or the court), the court will reject the claim and the plaintiff will have to bear the costs of the proceedings.¹¹⁸ In addition, German courts do not have a system of discovery or similar disclosure obligations comparable to the common law system. The German courts have not yet developed any principles that would alleviate this burden of proof.

4. Have national courts recognised standing of parties whose competitive position is not affected by the grant of illegal aid? Please reply with “yes”, “no” or “unclear”. If the reply is “yes”, please also specify whether the national courts applied the EU General Court ruling in *Streekgewest Westelijk Noord-Brabant v Staatssecretaris van Financien (C-174/02, paragraph 19)* – or have developed their own jurisprudence.

No, not in State aid matters.

With regard to State aid disputes, the German civil courts have only recognised the standing of third parties if they are competitors of the beneficiary.¹¹⁹

In civil law disputes, the BGH acknowledged that Article 108 (3) TFEU constitutes a “protective law” within the meaning of Section 823 (2) of the German Civil Code that also serves to protect competitors of the beneficiary. However, German civil courts have not accepted a broader approach that would also recognise the standing of third parties whose competitive position is not affected by the grant of illegal aid.

Examples of such case law include the following decisions:

– The Frankfurt a.M. Higher Regional Court rejected in its decision of 21 March 2018 (4 U 207/17) the claimant’s standing based on the argument that he could not demonstrate that he was a competitor of the aid recipient. In particular, the court noted that the mere competition with regard to a single property parcel and the unsubstantiated claims as regards the claimant’s “significant economic disadvantages” could not result in the claimant being considered as having standing as a competitor of the aid recipient (para. 3).

– In its decision of 21 July 2009 (Kart U 1/07), the Brandenburg Higher Regional Court rejected an air carrier’s standing against the decision to grant aid to another air carrier with regard to the latter’s airport fees since the two companies were not actual competitors with regard to the respective airport (paras. 117 seqq.).

The same applies to the administrative courts which have acknowledged that competitors fall within the scope of protection provided by Article 108 (3) TFEU and that in administrative proceedings a competitor, but not any third party, may therefore have standing to sue the state for the recovery of an unlawful aid¹²⁰.

Notable in this context is also a recent decision of the Hesse Higher Social Court (*Landessozialgericht*) that refers to the CJEU’s *Streekgewest* decision and recognises that in State aid disputes not only immediate and current competitors might have standing. Nevertheless, the decision still sets a rather high threshold for a third party to have

¹¹⁸ *Soltész*, in: *Getting the Deal Through, State Aid 2022*, Q 23.

¹¹⁹ BGH, Decision of 10 February 2011 – ZR 213/08 – AirBerlin / Flughafen Lübeck, paras. 21, 25 et seq. and 34 seqq.; BGH, Decision of 10 February 2011 – I ZR 136/09 – Flughafen Frankfurt-Hahn, paras. 25 et seqq., 32 and 42; OLG Brandenburg, Decision of 21 July 2009 – Kart U 1/07, NJOZ 2010, 208 (210).

¹²⁰ BVerwG, Decision of 16 December 2010 – 3 C 44/09 – Zweckverband Tierkörperbeseitigung, para. 13; OVG Rheinland-Pfalz, Decision of 24 November 2009 – 6 A 10113/09, para. 20; VG Berlin, Decision of 27 November 2020 – 26 K 215.19, paras. 26 seqq.

standing in State aid disputes since it requires that the aid measure in question needs to cause a “distortion of competition that has a negative impact on the economic activity of the third party”.¹²¹ Ultimately, the court rejected the standing of the claimant in this case since it could already exclude that the granting entity had breached the standstill obligation of Art. 108 (3) sent. 3 TFEU.

- 5. If the answer to question 4 is “yes”, do environmental NGOs have standing before national administrative bodies (if any) or courts competent in State aid matters to challenge government measures for alleged illegal State aid? Please reply with “yes”, “no” or “unclear”.**

Not applicable.

For completeness, please note that the the German Environmental Appeals Act (Umwelt-Rechtsbehelfsgesetz – UmwRG) is not able to grant standing in relation to State aid matters. This is due to the limited the scope of application of this Act (cf. Sec. 1(1) UmwRG). It provides environmental NGOs with standing before administrative courts only with regard to an exhaustively defined list of decisions. This includes inter alia decisions concerning the admissibility of certain potentially environmentally significant infrastructure projects, but not decisions to grant State aid (even if they might have an environmental impact).

- 6. If the answer to question 5 is “yes”, which criteria do NGOs need to fulfil to be granted standing (some examples of criteria may include registration / accreditation with a specific body; number of members; certain period of existence; requirements as to its statutory purpose or form of incorporation; relationship between its activities and the aid challenged etc.)? Are the criteria different for foreign NGOs (i.e. not registered in the country where the aid is challenged)?**

Not applicable.

- 7. Has an NGO with an environmental object previously brought an action against a State aid measure or scheme in the Member State and been recognised by the courts as being entitled to do so? Please reply with “yes” or “no”. If the answer is “yes”, please also detail the context and the outcome of the judgement(s) concerned (admissibility and merits of the action).**

No, we are not aware of an NGO with an environmental object that has brought an action against a State aid measure or scheme in Germany and been recognised by the courts as being entitled to do so. Given that German courts recognise standing of parties in State aid cases only where they are competitors of the beneficiary and their competitive position is affected by the grant of illegal aid (cf. question 4), we consider it unlikely that German courts would consider such claims as admissible.

- 8. Have national courts already relied on / referred to point 27 of the revised Commission’s Notice on the enforcement of State aid law by national courts recommending to grant standing to NGOs? Please reply, to the best of your knowledge, with “yes” or “no”. If yes, please also provide a short summary as well as a reference to where the relevant judgement can be accessed.**

No, not to our knowledge.

¹²¹ LSG Hessen, Order of 22 January 2018 – L 8 KR 441/17 B ER, para. 33.

Available grounds

9. **Can a claimant (any category) raise claims related to violations of EU or national environmental law by an aid measure or an activity in support of an action aiming at challenging the grant of aid? Please reply with “yes”, “no” or “no data”.**

No data. We are not aware of decisions of German courts according to which a claimant can raise claims related to violations of EU or national environmental law by an aid measure or an activity in support of an action aimed at challenging the grant of aid. However, against the background of the CJEU’s *Austria v. Commission (Hinkley Point C)* judgment¹²², it might be possible for the claimants to challenge State aid measures based on violations of EU or national environmental law in the future.

10. **Are there examples of cases where such claims were raised (if so please detail the context and outcome)?**

No, not to our knowledge.

11. **More generally, are there instances of claimants (any category) alleging, in support of an action challenging an aid measure or scheme, that a State aid measure or activity breached EU or national law that is not directly State aid law (other than environmental law, which is covered by question 9 above, such as law on public procurements, planning law, tax law etc.)? Please detail the context and the outcome (competence of the courts, merits of the claim and potential test applied by the court, potential reference for preliminary ruling to the CJEU under Article 267 TFEU)?**

The **Mannheim Higher Administrative Court** recently had to deal with a case where a claimant alleged, in support of an action challenging aid, that the measure breached EU or national law that is not directly State aid law. The proceedings mainly concerned complex questions of waste disposal. The claimant had argued that a contract did not comply with EU State aid law and was therefore null and void. However, the claimant did not argue that the contract breaches State aid-specific provisions, but rather that its non-conformity with EU State aid law (in particular Art. 107 TFEU and Art. 108 (3) sent. 1 and 3 TFEU) already resulted from an obvious breach of national public procurement law.¹²³ The court decided – without a reference for a preliminary ruling to the CJEU – that the breach against national public procurement law on a stand-alone basis was not sufficient to establish the existence of State aid within the meaning of Art. 107 (1) TFEU and that the measure in question ultimately did not constitute State aid.¹²⁴ Accordingly, the court did not apply a specific test (e.g. an assessment of whether the breach of EU or national law was ‘inextricably linked’ with the aid measure).

Similarly, the **Hamburg Higher Administrative Court** held in a recent decision that a measure’s (alleged) breach against national public procurement law did not mean that the same measure automatically violated EU State aid law.¹²⁵ The claim was not immediately directed against an aid measure, but rather challenged the lawfulness of a planning decision allowing the construction of port infrastructure. The court decided without a reference for a preliminary ruling to the CJEU and without applying a specific test.

¹²² CJEU, Judgment of 22 September 2020, C-594/18 P, *Austria v Commission*, ECLI:EU:C:2020:742.

¹²³ VGH Mannheim, decision of 13 May 2016 – 10 S 1307/15, para. 11.

¹²⁴ VGH Mannheim, decision of 13 May 2016 – 10 S 1307/15, para. 50 seqq.

¹²⁵ OVG Hamburg, decision of 12 May 2021 – 1 Bf 492/19, para. 113.

12. Have there been any instances in the Member States of a national court referring the validity of a Commission's State aid decision to the CJEU under Article 267 TFEU between 1 January 2019 and 31 December 2022?

No, to our knowledge there has not been such a reference for a preliminary ruling by a German court.

For completeness, please note that the Berlin Administrative Court has issued on 20 January 2021 a request for a preliminary ruling on State aid related questions (case C-76/21). However, the request does not concern the validity of a Commission's State aid decision, but rather abstract questions on interpretation. In addition, the request was withdrawn in May 2021.

Procedural costs risks

13. If the answer to question 5 is "yes", what are the procedural costs and potential adverse costs to be incurred by an NGO for bringing a State aid-related action before a national court, both in case the challenge is ultimately successful and if it unsuccessful?

Not applicable.

For completeness, please note that the usual procedural rules on costs also apply in State aid cases. This means that if the NGO's appeal is successful, the procedural costs (including the court fees and the NGO's attorney fees) will be borne by the defendant. Correspondingly, if the NGO's appeal is unsuccessful, it is the NGO which will bear the procedural costs (including the court fees and the defendant's attorney fees).

With regard to proceedings before German civil courts, the procedural costs depend on the litigation value. If the amount at stake is EUR 1,000,000, the NGO would have a cost risk in first instance of up to approx. EUR 32,000 (EUR 17,500 court fees and EUR 15,500 defendant's attorney's fees).

With regard to proceedings before German administrative courts, the procedural costs highly depend on the individual circumstances of the case at hand. It is likely that these will be below the procedural costs incurred before the German civil courts. In the case of an unsuccessful claim of a competitor, the procedural costs would probably depend on the amount of (alleged) State aid at stake (44.1. Streitwertkatalog für die Verwaltungsgerichtsbarkeit). This means that if the aid amount at stake were EUR 1,000,000, the NGO would have a cost risk in first instance of up to approx. EUR 22,500 (EUR 12,000 court fees and EUR 10,500 defendant's attorney's fees).

The explained cost risk for NGOs may partly be alleviated by the possibility for NGOs to receive assistance with court fees (Prozesskostenhilfe) upon filing a corresponding application pursuant to Sec. 114 seqq. of the Code of Civil Procedure (Zivilprozessordnung).¹²⁶ However, this requires that an NGO is established in the EEA, has its registered seat there, that this NGO is not able to fund the court fees, and that refraining to bring the respective action would contradict the public interest (Sec. 116 no. 2 of the Code of Civil Procedure). In addition, the approval of assistance with court fees does not affect the NGO's risk of having to bear the defendant's attorney fees in case the claim is unsuccessful.

¹²⁶ In conjunction with Sec. 166 of the Law on Administrative Court Proceedings (Verwaltungsgerichtsordnung) for administrative proceedings.

Remedies

14. In case the reply to questions 4 and/or 5 is yes, what remedies are available to non-competitor applicants before an administrative body (if any) or a court in case of breach of environmental law by an aid measure or by the activity?

Not applicable.

For completeness, please note that we do not think that an argumentation based on an analogy to competitors' remedies would have a realistic chance of success before German courts. German law and its application by German courts explicitly require the demonstration of an adverse effect on the third party's competitive position in order to grant it standing. This is also confirmed by the Environmental Appeals Act (Umwelt-Rechtsbehelfsgesetz – UmwRG), i.e. existence of a specific legal act providing NGOs (whose competitive positions are not affected by administrative decisions concerning the admissibility of certain infrastructure projects) standing against these decisions. Since this Act does not cover State aid decisions (even if they might have an environmental impact), there does not seem to be much room for a reasoning by analogy.

Transparency

15. How can third parties find out about possible planned, illegal or incompatible State aid from official sources? Are there national registers? What publicity is given to the granting of aid and to its notification to the EU Commission?

In Germany, there is no general *ex ante* or *ex post* reporting mechanism (including national or regional registers) facilitating the prevention or detection of the granting of illegal or incompatible State aid.

Planned State aid measures do not necessarily have to be approved by a specific public act of the legislator or the government. Budget plans contain, in principle, all planned State aid measures and are published on all state levels (federal government¹²⁷, federal states¹²⁸ and municipalities). However, budget plans do not always allow for the identification of specific aid measures, let alone the assessment of their lawfulness/compatibility, since the information contained in them is generally very generic and vague. Public records of the administration are usually only available to a very limited extent, given that the internal minutes of the administration are not published.

Also as regards State aid that has already been granted, there is no mandatory publication process. However, there are some sources that provide a certain level of transparency:

- European Commission – State Aid Transparency Public Search¹²⁹ : The Commission's State Aid Transparency public search page gives access to individual award data provided by Germany in order to comply with the European transparency requirements for State aid (e.g. Art. 9 GBER). Similar information can often also be found directly on the individual website of the granting entity.¹³⁰

¹²⁷ Budget Plan of the Federal Republic of Germany for 2023: available under https://www.bundshaushalt.de/static/daten/2023/soll/Bundshaushaltsplan_HH_2023.pdf (only accessible in German).

¹²⁸ As an example: Budget of the Federal State of Lower Saxony for 2022/2023: available under https://www.mf.niedersachsen.de/download/180014/Haushaltsplan_2022_und_2023_gesamt.pdf (only accessible in German).

¹²⁹ <https://webgate.ec.europa.eu/competition/transparency/public?lang=en>

¹³⁰ For example, the publication on the website of the Ministry for Environment, Climate Protection and the Energy Sector Baden-Württemberg as regards the transparency obligations pursuant to Art. 9 GBER:

- **Subsidy reports:** The German Federal Government¹³¹ and a few federal states¹³² also publish so-called subsidy reports which contain generic information on State aid granted in Germany at the federal and state level.

In practice, complainants/claimants regarding German State aid measures often base their complaints/claims on media reports and public statements by politicians. In addition, it might be an option at least in some cases to try to gain access to information via information rights under corporate law (e.g. by becoming a shareholder of the beneficiary and learning about the aid measure through the exercise of shareholders' rights, such as participating in a shareholder meeting).

16. Please provide details of any national legislation that gives third parties access to documents on State aid granted to beneficiaries that are held by national public authorities.

In the recent years, the Federal Republic of Germany¹³³ and most of the federal states¹³⁴ have adopted freedom of information laws that allow some access by the general public/third parties to information held by national public authorities.

However, all national statutes contain a number of significant exceptions, e.g. relating to the protection of ongoing proceedings (including formal State aid proceedings before the European Commission; Art. 3 No. 1 lit. g IFG¹³⁵) and business or trade secrets (Art. 6 IFG). Most of these exceptions are broader than those under Regulation 1049/2021, which means that there is virtually no transparency as regards State aid measures.¹³⁶

Accordingly, third parties usually do not have a statutory right to access the authority's file in order to gain a factual basis for a claim/complaint. We are also not aware of any court decisions that concern the access to documents related to State aid measures that are held by national public authorities.

<https://um.baden-wuerttemberg.de/de/presse-service/oeffentliche-bekanntmachungen/aktuelle-agvo-beihilfemassnahmen> (only accessible in German).

¹³¹ German Ministry of Finance, 28th subsidy report of the Federal Republic of Germany (2019-2022), available under

https://www.bundesfinanzministerium.de/Content/DE/Downloads/Broschueren_Bestellservice/28-subventionsbericht.pdf?__blob=publicationFile&v=6 (only accessible in German).

¹³² Ministry of Finance of the Federal State of Lower Saxony, subsidy report 2021-2025, available under https://www.mf.niedersachsen.de/download/185823/Subventionsbericht_2021_-_2025.pdf (only accessible in German).

¹³³ Federal Act Governing Access to Information held by the Federal Government (*Informationsfreiheitsgesetz* – “IFG”).

¹³⁴ As an example: Act Governing Access to Information in Baden-Württemberg (*Landesinformationsfreiheitsgesetz Baden-Württemberg* – “LIFG”).

¹³⁵ Cf. OVG Hamburg, Order of 29 May 2007 – 1 Bs 334/06.

¹³⁶ Soltész, in: Getting the Deal Through, State Aid 2022, Q 17.

Greece

Context

- 1. Have the public authorities or national courts in the Member State expressed any public opinion or issued any ruling referring to the application of the Austria v. Commission (Hinkley Point C) judgment and its implications at national level (e.g. on checks to be performed before or after granting aid, interactions with the EU Commission, or access to justice rules or practices)? If yes, please provide a short summary as well as a reference to where this public opinions or judgements can be accessed.**

No.

- 2. Are public consultations organised at national or local level on planned aid measures or schemes? Please specify if this includes all or only certain planned measures or schemes and whether these consultations are open to participation by environmental NGOs. Please provide recent examples of such consultations with the references to the relevant websites.**

When an aid measure is implemented on the basis of a law, the draft law or implementing act is published for public consultation on the website www.opengov.gr.

For example, Law 4887/2022 draws on the possibilities of the Global Block Exemption Regulation 651/2014 (“GBER”), to set up aid schemes in several areas e.g. for 1. Digital and Technological Business Transformation, 2. Fair Development Transition, 5. Research and Applied Innovation, 6. Agri-Food - Primary Production and Processing of Agricultural Products - Fisheries, 7. Manufacturing - Supply Chain, 8. Business Externality, 9. Tourism Investment Promotion, 10. Alternative Forms of Tourism, 11. Large Investments, 12. European Value Chains and 13. Entrepreneurship 360°. The draft law had been put up on the [website](#) for public consultation between 3 and 17 November 2021. The law was adopted on 4 February 2022.

Another example is the draft ministerial decision setting up the aid scheme “innovation aid for SMEs” of Law 4399/2016, which was published for public consultation on the [website](#) opengov.gr from 13 to March to 16 April 2018.

A third example is the draft ministerial decision setting up the aid scheme “synergies and networking” of Law 4399/2016, which was published for public consultation on the [website](#) opengov.gr from 13 to March to 16 April 2018. The ministerial decision was adopted on 12 October 2018 and published on the [Government Gazette](#) on 24 October 2018.

In such scenarios, the public consultation is open to all, including environmental NGOs. Unfortunately, not all aid measures are based on legislative acts (or acts based on such laws), and in such cases there is almost never any public consultation.

Standing

3. Which of the administrative or civil courts are competent to challenge government measures in court for alleged unlawful State aid and for asking remedies (including suspension, recovery of aid and damages)? Do the rules differ (and how) between administrative and civil courts?

The main principles are governed by EU State aid law directly. Against this EU State aid law background, any competent court will have to hear private complaints against the award of (i) unlawful aid, i.e., not notified to the European Commission or implemented before the latter's approval, (ii) unlawful and incompatible aid following a negative decision by the Commission, or (iii) misused aid, i.e. not granted in compliance with the conditions and or commitments set in the Commission's decision.

Administrative courts

In most cases, the Greek administrative courts are competent to hear State aid matters. According to article 1(4)(f) of Law No. 1406/1983, the administrative courts have jurisdiction regarding disputes that derive from the issuance of administrative acts relating to the award of European or national aid, subsidies and similar benefits, as well as the administrative acts that impose a relevant measure or sanction. State aid cases are introduced before the Greek administrative courts of first instance.

However, where the aid is linked to a tax measure of an amount exceeding €150,000 or a contract awarded after a public procurement procedure, the case is introduced to the administrative court of appeals as the court of first instance, pursuant to article 6(2) of the Greek Code of Administrative Procedure.

Finally, if the measure is part of an investment scheme, the Supreme Administrative Court (Council of State) is competent pursuant to article 22 paragraph 1 of Law No. 4864/2021.

Decisions of the administrative courts of first instance can be appealed before the administrative courts of appeal where the total amount of the dispute exceeds €5,000, within 60 days of the date on which the decision of the court is served to the parties. An appeal does not have suspensory effect, but such suspension can be requested in case of risk of irreparable damage.

Decisions of administrative courts of appeal can be challenged solely on points of law before the Council of State, Greece's supreme administrative court within 60 days.

Pursuant to article 202 of the Greek Code of Administrative Procedure, the applicant can request the suspension of the execution of the administrative act granting the aid. The suspensory effect of the decision expires with the issuance of the final judgment of the administrative court on the legality of the administrative act in question. Suspension can be granted if the measure would lead to irreparable damage for the applicant or if the main action for the annulment of the administrative measure is very likely to be accepted. The applicant bears the burden of proof. In any case, the suspension request is denied if the action for annulment is obviously unfounded or inadmissible (even if the damage is considered to be irreparable). The suspension request is also denied if the negative effects of such a suspension on the public or third-party interest exceed the benefit for the applicant.

Concerning specifically the recovery of aid found incompatible by a Commission decision, a specific process is provided for in article 202, paragraph 4 of the Greek Code of

Administrative Procedure. According to this procedure, if the beneficiary wants to request the suspension of the act implementing such recovery, the following cumulative conditions must be satisfied (in line with the EU courts' case law – see joined Cases C-143/88 and C-92/89, *Zuckerfabrik Süderdithmarschen* and Case C-465/93, *Atlanta* a.o.):

- apart from the action before the national court, they must have filed an action for annulment before the General Court. Where such an action has not been filed, the national court must send a relevant preliminary question to the CJEU;
- there is serious doubt as to the validity of the Commission's decision or the national act implementing it; and
- the plaintiff demonstrates that the immediate execution of the act will cause the plaintiff irreparable damage.

In terms of interim measures, administrative acts can be suspended in the case of risk of irreparable harm. In those cases, the applicant must first file its main action against the administrative act in question.

Unfortunately, there seems to still be some confusion or reluctance by Greek courts to apply the direct effect of article 108(3) TFEU. For instance, in its Decision A3016/2014, in which the applicants had raised the violation of article 108(3) TFEU, the Council of State rejected the argument on the basis that it was not competent to rule on the compatibility of the alleged aid. But this is a separate question, which indeed falls under the exclusive competence of the Commission, independent from the obligation to notify State aid measures and only implement them after their approval from the Commission, a question which falls within the scope of the national courts' powers. The Council of State should have assessed whether the measure constituted aid that had to be notified to the Commission, without examining its possible compatibility or incompatibility.

Civil courts

If aid is granted via a contract between the beneficiary and an administrative body under the provisions of private law, then the civil courts are competent to examine the case. Civil courts are also competent for damages actions brought against State aid beneficiaries.

Judgments of civil courts can be appealed within 30 days if the party lives in Greece and 60 days if the party lives abroad or does not have a known residence. An appeal in principle suspends execution of the first-instance judgment, unless the judge has decided it is provisionally enforceable. Court of appeal judgments can be challenged before the Supreme Court (*Areios Pagos*) only on points of law, within 30 days if the party lives in Greece and 60 days if the party lives abroad or does not have a known residence.

Greek national courts have seldom been petitioned to enforce compliance with State aid rules or the standstill obligation under article 108(3) TFEU, although such actions are still not very frequent. Such an action does not automatically have suspensory effect, but the applicant can request the suspension or even the provisional recovery of the aid granted in violation of the standstill obligation.

The procedure before civil courts is regulated by the Greek Code of Civil Procedure. In terms of remedies, the courts are limited by the parties' request, i.e. they cannot grant any remedy which was not requested by a party.

Regarding damages, any person who considers that he or she has suffered damage by any action of the aid beneficiary, which can be directly linked to the aid received, can claim compensation before the civil courts under the general reparative provisions of article 914

of the Civil Code or, eventually, under the unjustified enrichment provisions, in particular article 904 of the Civil Code; however, under the latter legal basis, the causal link would be particularly difficult to demonstrate.

Damages are calculated according to methodologies similar to antitrust cases (loss of revenue, reduction of turnover, etc); however, it cannot include the aid and interest to be recovered.

As ordinary proceedings are long in Greece, interim measures can be requested (e.g. the suspension of the decision granting an unlawful aid), but the conditions are very strict: there must be (i) an urgent need or imminent danger to protect or preserve a legitimate interest or to regulate a situation; and (ii) reasonable grounds for believing that the right in respect of which the provisional remedy is sought exists.

Preliminary evidence must be presented showing that there are reasonable grounds for the measure. Full proof is not needed; incomplete proof that provides a lesser degree of certainty regarding the facts that need to be established is sufficient. The court can grant protection once it considers that the facts alleged are probable.

Interim measures are not ordinarily open to appeal, the only exception being those imposing a provisional regulation of rights of possession and use, which may be appealed before the competent multi-member court of first instance within 10 days of service of the order.

As with civil courts, there seems to be some confusion between the examination of the compatibility of the aid, and its possible unlawfulness (i.e. the absence of prior notification and/or approval by the Commission). In its judgment 998/2017, the Supreme Court seems to have considered that the *Altmark* criteria were satisfied, but considered on this basis that the measure was not incompatible with the internal market (which is an exclusive competence of the Commission), when it should have concluded that the measure did not constitute State aid.

- 4. Have national courts recognised standing of parties whose competitive position is not affected by the grant of unlawful aid? Please reply with “yes”, “no” or “unclear”. If the reply is “yes”, please also specify whether the national courts applied the EU General Court ruling in *Streekgewest Westelijk Noord-Brabant v Staatssecretaris van Financien* (C-174/02, paragraph 19) – or have developed their own jurisprudence.**

Yes.

There is no specific national rule describing in detail who has legal standing to bring an action against the award of State aid. The direct effect of article 107(1) TFEU (on the existence of aid) and of article 108(3) TFEU (on the notification and standstill obligations) allows affected parties such as competitors of the beneficiary to bring an action before the competent court. Under general administrative law, the most important element to be demonstrated is the causal link between the administrative act and the alleged damage.

Greek courts have not applied the EU Court’s ruling in case C-174/02 but developed their own jurisprudence. For example, in its ruling 998/2017, Greece’s Supreme Civil Court (*Areios Pagos*) accepted the action by a dismissed employee against his former public employer. The dismissed employee was arguing that the limitation (provided for by the applicable legislation) in the compensation the employer could pay to him constituted unlawful State aid. According to the applicant, other employers did not benefit from such

a limitation of dismissal compensation, and therefore the provision in question reduced the costs the employer would have normally had to bear. The application was dismissed on substance, although the court seems to have confused the analysis of the existence and of the compatibility of the aid (see above, last paragraph of the answer to question 3).

A similar case brought by a dismissed employee had been the object of ruling 194/2008 of Greece's Supreme Civil Court. The measure in question was again the limitation of the dismissal compensation the employer could pay. In that case however, there had been no confusion between the analysis of the existence and of the compatibility of the aid, as the court had ruled that the measure did not entail any public resources, either in the form of a positive transfer of funds, or in the form of foregoing State revenue.

In its ruling 1492/2013, the Council of State left open the question of admissibility and rejected on substance the argument by the individual applicants that the ministerial decision approving the environmental terms of the works following the sale of the Cassandra mines constituted State aid. The applicants were referring to the Commission's decision SA.23602 in which it had been found that the State had sold the mines below their market value, and also exempted the buyer from the applicable transaction taxes. In a blatant violation of this decision, the Council of State considered that the benefits for the State were not limited to the price paid by the buyer. Understanding perhaps that it had no right to reach a different conclusion than the Commission on the existence of State aid in this context, the Council of State added that, to the extent this claim challenges directly the terms of the concluded agreement, it is inadmissible as this agreement cannot be controlled in an action against a decision concerning the environmental terms of specific works or activities. But this is of course contradictory to its previous statement that the admissibility of this claim can be left open as it can be rejected on substance (wrongfully so as the Council of State ignored the Commission's decision).

In its rulings 3013/2014 and 3016/2014, the Council of State accepted the claim by various employees of a public bank under resolution that the transfer of its "good" assets was State aid in favour of the beneficiary, but rejected it on substance. Once again, the Council of State seems to have confused the existence of aid with its compatibility, as it considered that it did not have jurisdiction to assess the compatibility of the measure under Article 107(1) TFEU. While this is true of course, the applicants were referring to the obligation to notify all new aid under Article 108(3) TFEU, which the Council of State could and should have examined.

- 5. If the answer to question 4 is "yes", do environmental NGOs have standing before national administrative bodies (if any) or courts competent in State aid matters to challenge government measures for alleged unlawful State aid? Please reply with "yes", "no" or "unclear".**

Unclear.

We have not found any precedent where an environmental NGO was accepted as having standing to challenge government measures entailing alleged unlawful aid. More generally, there have not been many private enforcement State aid cases before national courts in Greece.

That said, as explained above, Greek courts have recognised standing of parties whose competitive position was not affected by the grant of unlawful aid.

In Greece, a legitimate interest giving legal standing is that which is not contrary to the law, is recognised as worthy of legal protection and is in need of legal protection. It cannot

be a mere expectation or a mere interest. It must also be clarified that in administrative law a legitimate interest may be not only material but also moral.

Such a legitimate interest has three main characteristics: it is (i) personal, (ii) direct, and (iii) current.

In environmental infringement matters, environmental NGOs have been found to have standing (i) when it had some “geographical connection” with the alleged infringement (property etc.), and (ii) when its statute mentioned amongst its objectives the protection of the environment (Council of State, rulings 103/2018 and 571/2018). Such objective does not need to be exclusive, and it can even be simply inferred from the NGO’s statute. Some authors have qualified this line of jurisprudence as getting dangerously close to an *actio popularis*.¹³⁷

In some instances, NGOs are explicitly mentioned as having standing to bring an action before the Greek courts. Article 7 of Law 4042/2012 on the protection of the environment through criminal law provides that “[i]n cases of environmental crimes, the State, as well as the Local Authorities in the region where the crime was committed, the Technical Chamber of Greece, the Geotechnical Chamber of Greece, universities, other scientific bodies, bar associations, associations of lawyers, bodies managing protected areas, non-governmental organisations and natural persons, may be present as civil plaintiffs, irrespective of whether they have suffered damage to property, in support of the charge alone and requesting in particular, as far as possible, restitution. A written preliminary procedure is not required.”

In light of the above, we could not exclude that an environmental NGO could be recognised as having legal standing in a State aid matter, but this would need to be tested in practice.

- 6. If the answer to question 5 is “yes”, which criteria do NGOs need to fulfil to be granted standing (some examples of criteria may include registration / accreditation with a specific body; number of members; certain period of existence; requirements as to its statutory purpose or form of incorporation; relationship between its activities and the aid challenged etc.)? Are the criteria different for foreign NGOs (i.e. not registered in the country where the aid is challenged)?**

The answer to question 5 was “unclear”, but as per above, a NGO would need at minimum to have environmental protection mentioned as one of its objectives in its statutes.

- 7. Has an NGO with an environmental object previously brought an action against a State aid measure or scheme in the Member State and been recognised by the courts as being entitled to do so? Please reply with “yes” or “no”. If the answer is “yes”, please also detail the context and the outcome of the judgement(s) concerned (admissibility and merits of the action).**

No.

¹³⁷ K. Gogos, “Towards EU procedural rules for environmental litigation: aspects of judicial protection during environmental authorisation processes for works under the light of the latest case law of the Court of Justice of the EU (Προς μία ενωσιακή δικονομία των περιβαλλοντικών διαφορών: όψεις της δικαστικής προστασίας κατά την περιβαλλοντική αδειοδότηση έργων υπό το φώς της νεότερης νομολογίας του ΔΕΕ)”, *Journal of Public Law*, 4/2015, pp. 514; G. Siouti, “Manual of Environmental Law (Εγχειρίδιο Δικαίου Περιβάλλοντος)”, 2011, p. 115.

8. **Have national courts already relied on / referred to point 27 of the revised Commission’s Notice on the enforcement of State aid law by national courts recommending to grant standing to NGOs? Please reply, to the best of your knowledge, with “yes” or “no”. If yes, please also provide a short summary as well as a reference to where the relevant judgement can be accessed.**

No.

Available grounds

9. **Can a claimant (any category) raise claims related to violations of EU or national environmental law by an aid measure or an activity in support of an action aiming at challenging the grant of aid? Please reply with “yes”, “no” or “no data”.**

No data.

10. **Are there examples of cases where such claims were raised (if so please detail the context and outcome)?**

No data.

11. **More generally, are there instances of claimants (any category) alleging, in support of an action challenging an aid measure or scheme, that a State aid measure or activity breached EU or national law that is not directly State aid law (other than environmental law, which is covered by question 9 above, such as law on public procurements, planning law, tax law etc.)? Please detail the context and the outcome (competence of the courts, merits of the claim and potential test applied by the court, potential reference for preliminary ruling to the CJEU under Article 267 TFEU)?**

No. In the cases mentioned in question 4 above, the qualification of the measure as State aid was rejected, so there was no discussion on any link between the State aid argument and the other national law arguments raised by the applicants.

12. **Have there been any instances in the Member States of a national court referring the validity of a Commission’s State aid decision to the CJEU under Article 267 TFEU between 1 January 2019 and 31 December 2022?**

No.

Procedural costs risks

- 13. If the answer to question 5 is “yes”, what are the procedural costs and potential adverse costs to be incurred by an NGO for bringing a State aid-related action before a national court, both in case the challenge is ultimately successful and if it unsuccessful?**

The answer to question 5 was “unclear”, but as we consider that it cannot be excluded that an environmental NGO could be recognised as having legal standing in a State aid matter, we briefly described below the rules on procedural costs and potential adverse costs.

While there are some fixed costs both before civil and administrative courts, the main costs would be lawyer’s fees, and eventually any experts, bailiffs etc. that would need to intervene.

As a matter of principle, the legal costs and expenses incurred by the winning party generally become payable by the losing party (art. 275 of the Greek Code of Administrative Procedure and art. 176 of the Greek Code of Civil Procedure), depending on the extent of each party’s victory or loss. While there is no “indexation” on the value of the claim, the lawyers’ fees (which are usually the main costs), pursuant to Article 63 of the Code of Lawyers, must follow a degressive scale which sets their minimum level, ranging from 2% for claims up to 200.000 euros, going down to 0.05% for claims above 25.000.000 euros. It is worth noting that the amount awarded by the court is generally less than the actual costs.

Remedies

- 14. In case the reply to questions 4 and/or 5 is yes, what remedies are available to non-competitor applicants before an administrative body (if any) or a court in case of breach of environmental law by an aid measure or by the activity?**

While there are no data on such situations before Greek national courts, the suspension of the aid measure would seem to be the appropriate remedy. Pursuant to article 202 of the Code of Administrative Procedure, the applicant can request for the suspension of the execution of the administrative act granting the aid. The suspensory effect of the decision expires with the issuance of the final judgment of the administrative court on the legality of the administrative act in question.

Suspension can be granted if the measure would lead to irreparable damage for the applicant or when the main action for the annulment of the administrative measure is very likely to be accepted. The applicant bears the burden of proof.

In any case, the suspension request is denied if the action for annulment is obviously unfounded or inadmissible (even if the damage is considered to be irreparable). The suspension request is also denied if the negative effects of the suspension on the public or a third-party interest exceeds the benefit for the applicant.

Transparency

15. How can third parties find out about possible planned, unlawful or incompatible State aid from official sources? Are there national registers? What publicity is given to the granting of aid and to its notification to the EU Commission?

As explained above, when an aid measure is implemented through a legislative text, there can be a public consultation which gives the opportunity to third parties to submit observations and more generally become aware of the planned measure.

Large aid schemes are also generally publicised, as these are viewed positively by the public opinion, and the public authorities thus want to advertise them.

There is a State aid registry¹³⁸, but it only concerns lawful aid. The existence of incompatible aid can only result from a Commission decision, which is published on DG COMP's website. Negative decisions are not very frequent, so they do get their share of publicity.

16. Please provide details of any national legislation that gives third parties access to documents on State aid granted to beneficiaries that are held by national public authorities.

Article 5 A, in combination with Article 10 of the Greek Constitution establish the right to access public documents, as part of the principle of transparency of the action of public authorities. This right is specified by article 5 of the Greek Administrative Code, which provides that "Any interested party shall have the right, upon written request, to inspect administrative documents. Administrative documents are those drawn up by the public authorities, such as reports, studies, minutes, statistics, circulars, instructions, replies, etc. administrative replies, opinions and decisions."

In ongoing proceedings before civil courts, articles 450-452 of the Greek Code of Civil Procedure regulate the access to documents.

In the absence of judicial proceedings, articles 902-903 of the Greek Civil Code provide that anybody with a legitimate interest to be informed about the content of a document in the possession of someone else, has the right to request to access it if the document (i) was prepared for the benefit of the party requesting to access it, (ii) certifies a legal relationship involving the applicant, or (iii) concerns negotiations entered into in relation to such a legal relationship either directly by the applicant himself or, in his interest, through the mediation of a third party.

¹³⁸ <https://app.opske.gr/>

The Netherlands

Introduction

For readability purposes, abbreviations and references to the English translation of Dutch regulations and instances are used throughout the advice. To avoid any confusion or misunderstandings, a short glossary has been included.

LIST OF REGULATIONS	
Regulation	Dutch version
Competition Act	Mededingingswet
Dutch Code of Civil Procedure (DCCP)	Wetboek van burgerlijke rechtsvordering (Rv)
Dutch Civil Code	Burgerlijk Wetboek
Dutch Open Government Act	Wet open overheid (Woo)
General Administrative Law Act (GALA)	Algemene wet bestuursrecht (Awb)
State Taxes Act	Algemene wet inzake rijksbelastingen
Telecommunications Act	Telecommunicatiewet
Treaty on the Functioning of the European Union (TFEU)	Verdrag betreffende de werking van de Europese Unie (VWEU)

LIST OF ENTITIES	
Regulation	Dutch version
Administrative Jurisdiction Division of the Council of State	Afdeling Bestuursrechtspraak van de Raad van State (ABRvS)
Central Appeals Court	Centrale Raad van Beroep (CRvB)
District Court	Rechtbank in eerste aanleg
Court of Appeal	Gerechtshof
European Law Expertise Centre	Expertisecentrum Europees Recht (ECER)
Netherlands Enterprise Agency	Rijksdienst voor Ondernemend Nederland (RVO)
Supreme Court	Hoge Raad (HR)
Trade and Industry Appeals Court	College van Beroep voor het Bedrijfsleven (CBb)

Context

1. **Have the public authorities or national courts in the Member State expressed any public opinion or issued any ruling referring to the application of the *Austria v. Commission (Hinkley Point C)* judgment and its implications at national level (e.g., on checks to be performed before or after granting aid, interactions with the EU Commission, or access to justice rules or practices)? If yes, please provide a short summary as well as a reference to where these public opinions or judgements can be accessed.**

No (published) judgment of national courts or opinion by public authorities in the Netherlands has referred to the application of the *Hinkley Point C* judgement of the CJEU. An 'official' mention of the case can be found on the website of the European Law Expertise Centre, which is part of the Dutch Ministry of Foreign Affairs. The webpage only

contains a summary of the judgment and no further opinion or statement on the implications at a national level.¹³⁹

2. Are public consultations organised at national or local level on planned aid measures or schemes? Please specify if this includes all or only certain planned measures or schemes and whether these consultations are open to participation by environmental NGOs. Please provide recent examples of such consultations with the references to the relevant websites.

Public consultations in the Netherlands are carried out by Ministries on drafts of laws, general administrative measures, ministerial regulations, and policy memoranda. Occasionally, also the House of Representatives (*Tweede Kamer*) carries out public consultations on own-initiative proposals. Contributions to public participations can be made by anyone, regardless of whether they have a legitimate interest, generally within a period of four weeks after publication. Examples of environmental organizations that repeatedly reply to public consultations are *Greenpeace* and *Milieudefensie*.¹⁴⁰ After closing the consultation, the issuing authority normally publishes a brief report summarizing the contributions. You can find more information about current government consultations on the government website.¹⁴¹ Additionally, you could subscribe to the e-mail service,¹⁴² which allows you to pick the Ministries and the subjects of interest and ensures that you will get notified when new consultations are opened. Unfortunately, this webpage is only available in Dutch. No distinction is made between consultation of State aid schemes on the one hand and draft legislation in general, on the other hand.

Another way to get informed about public consultations is via the website of the Netherlands Enterprise Agency ('RvO').¹⁴³ The RvO helps entrepreneurs and organizations to invest, develop and expand their businesses and projects by improving collaborations, sharing their know-how, and strengthening positions through funding and networks. The agency is formally part of the Ministry of Economic Affairs and Climate Policy and works on the instructions of Dutch Ministries and the European Union. At times the RvO receives instructions to organize public consultations (mostly online; sometimes physical) on specific financial instruments related to innovation and sustainability. Subscribing to the NEA monthly newsletter (in English)¹⁴⁴ ensures that you will get notified when new documents get published, or new consultations are opened.

In this context it should be emphasised that the Dutch governmental system is characterised by decentralisation. The Dutch municipalities and provinces are competent

¹³⁹ ECER, 'EU-Hof: Unieregels inzake staatssteun van toepassing op Euratom-Verdrag', accessible (in Dutch) via: [ecer.minbuza.nl](https://www.ecer.minbuza.nl)

¹⁴⁰ E.g. Milieu Defensie & Greenpeace, 'Reactie op de consultatie Tijdelijke wet Transitiefonds landelijk gebied en natuur Greenpeace Nederland en Milieudefensie', accessible via: <https://www.greenpeace.org/static/planet4-netherlands-stateless/2022/07/4510ecc8-reactie-greenpeace-nederland-en-milieudefensie-op-consultatie-tijdelijke-wet-transitiefonds-.pdf>

¹⁴¹ Overheid.nl, 'Internetconsultaties', accessible (in Dutch) via: <https://www.internetconsultatie.nl>.

¹⁴² Overheid.nl, 'Aanmelden e-mailservice nieuwe consultaties', accessible in Dutch via: <https://www.internetconsultatie.nl/voorkeurabonnement>

¹⁴³ Rijksdienst voor Ondernemend Nederland ('RvO'), 'Homepage', accessible in Dutch via: www.rvo.nl, and in English via: [english.rvo.nl](https://www.rvo.nl/en)

¹⁴⁴ RVO, 'Subscribe to our English Newsletter', accessible via: m11.mailplus.nl/wpTzyLuwksPH-3063-31100268-test-1

to design State aid schemes on an local (or regional) level and grant *ad hoc* State aid to undertakings with activities within their territory. As a result, the publication (and announcement) of State aid measures are scattered at municipal and provincial websites. See in more detail and a link to the websites of all the Dutch provinces the answer to question 14.

Finally, the public preparatory procedure ('PPP') should be mentioned.¹⁴⁵ The PPP aims to streamline the preparatory process for complex zoning plans and building projects. The procedure begins with a public notification in a newspaper.¹⁴⁶ This notification contains the substance of the draft decision, information on where documents will be made available for inspection, and who may submit views on the draft decision. Once the public authority has published the draft decision, oral and written views may be expressed for six weeks by (potentially) interested parties, both with a direct and indirect interest.¹⁴⁷ The public authority may also allow others (i.e. not being an interested party in the meaning of 1:2 General Administrative Act)¹⁴⁸ to express their views.¹⁴⁹

Standing

3. Which of the administrative or civil courts are competent to challenge government measures in court for alleged illegal State aid and for asking remedies (including suspension, recovery of aid and damages)? Do the rules differ (and how) between administrative and civil courts?

For the avoidance of any doubt, the analysis below only addresses the role of national courts in applying the standstill provision (the private enforcement of State aid law). The supervision by the European Commission and the possibility of appealing its decisions (the public enforcement of State aid law) is not discussed.

In practice, the question which court has jurisdiction in a State aid dispute depends on the type of act that granted the alleged illegal State aid. If the dispute concerns an 'administrative decision' (*besluit*) (i.e., a written decision taken by an administrative authority that involves a unilateral public act),¹⁵⁰ an **administrative court** should be addressed, unless that decision involves taxes, in which case a **tax court**¹⁵¹ should be addressed. Examples of administrative decisions are subsidy decisions by municipalities or the adoption of zoning plans. When a claimant has no possibility to bring a case before a tax court or administrative court, he can address a **civil court**. It follows that civil courts mostly deal with cases involving State aid granted by means of a private contract. In terms

¹⁴⁵ Section 3.4 of the General Administrative Law Act.

¹⁴⁶ Article 3:12 of the General Administrative Law Act.

¹⁴⁷ Articles 3:15 and 3:16 of the General Administrative Law Act.

¹⁴⁸ Article 1:2 of the General Administrative Law Act.

¹⁴⁹ Article 3:15 paragraph 2 of the General Administrative Law Act.

¹⁵⁰ Acts of Parliament do not fall under this definition as they are not drawn up by an administrative authority within the meaning of the General Administrative Law Act. Therefore, if alleged State aid is granted by means of an Act of Parliament, an applicant should address a civil court.

¹⁵¹ The resolution of disputes in national taxes is concentrated at five courts. These are the courts of North Netherlands (Leeuwarden), East Netherlands (Arnhem), North Holland (Haarlem), The Hague (Den Haag) and Zeeland / West Brabant (Breda).

of numbers, research has shown that the majority of State aid cases are brought before administrative courts.¹⁵²

Furthermore, in the context of division of courts, a further note must be made on the last instance courts. For both civil cases and tax cases, the Supreme Court takes on the role of last instance court.

For administrative cases, the highest court can either be one of the following:

- (i) First, the Administrative Jurisdiction Division of the Council of State ('Division'), which has general jurisdiction in appeal.
- (ii) Second, the Trade and Industry Appeals Court, which specializes in disputes regarding social-economic administrative law. This court also has jurisdiction in cases concerning specific laws, such as the Competition Act and the Telecommunications Act. Due to its specialization, this court deals with State aid issues on a regular basis.
- (iii) Finally, the Central Appeals Court, which specializes in social security and public service. This court rarely comes across State aid issues.

The administrative and civil courts follow (largely) separate procedural rules. The procedural rules for administrative courts, including all three types of last instance administrative courts, are laid down in the General Administrative Law Act ('GALA').¹⁵³ Tax courts largely follow the procedural rules of the administrative courts, with some exceptions laid down in specific tax laws. The procedural rules for civil courts are laid down in the Dutch Code of Civil Procedure ('DCCP').¹⁵⁴

The procedural rules for civil and administrative courts differ in some relevant areas in the context of State aid disputes. For example, the courts follow a different regime for admissibility of claims (see question 4).

Finally, courts have recognised the key role of the Commission in the assessment of State aid measures. For example, in the case *Ridderstee*, the Council of State ruled that if a party provides a sufficiently substantiated expert opinion on whether a measure constitutes as State aid, the public authority that issued the decision should ask advice from the Commission (para. 6).¹⁵⁵ Therefore, the court denied the request to qualify the measure as State aid, but reversed the decision based on insufficient preparation (para.

¹⁵² A.J. Metselaar, *Drie rechters en een norm. Handhaving van de Europese staatssteunregels voor de Nederlandse rechter en de grenzen van de procedurele autonomie*, Deventer: Wolters Kluwer 2016 (hereinafter: Metselaar 2016), Chapter 3; E. van den Brink & W. den Ouden, 'Chapter 14: Private Enforcement in the Netherlands', in: W. Wurmnest, F. Wollenschläger, et al, *Private Enforcement of European Competition and State Aid Law: Current Challenges and the Way Forward* (International Competition Law Series, Volume 82), p. 293.

¹⁵³ The General Administrative Law Act can be accessed (in English) through the website of the Dutch Authority for Consumers & Markets: www.acm.nl/en/publications/publication/15446/Dutch-General-Administrative-Law-Act.

¹⁵⁴ The Dutch Code of Civil Procedure can be accessed (in English) through the website: www.dutchcivillaw.com/civilprocedureleg.htm. Note that this is an unofficial translation.

¹⁵⁵ Council of State 13 February 2013, ECLI:RVS:2013:BZ1245.

6).¹⁵⁶ Another example is the ruling of the Trade and Industry Appeals Court of 29 December 2017 on a subsidy scheme for sheep herds. After consulting the European Commission, the Trade and Industry Appeals Court ordered the Dutch authorities to notify the scheme with the Commission.¹⁵⁷

4. Have national courts recognised standing of parties whose competitive position is not affected by the grant of illegal aid? Please reply with “yes”, “no” or “unclear”. If the reply is “yes”, please also specify whether the national courts applied the EU General Court ruling in *Streekgewest Westelijk Noord-Brabant v Staatssecretaris van Financien (C-174/02, paragraph 19)* – or have developed their own jurisprudence?

Yes, national courts have recognised standing of parties whose competitive position is not affected by the grant of illegal aid. However, a more recent case by the Supreme Court has significantly restricted the possibility for NGOs to initiate a private enforcement procedure.¹⁵⁸

A distinction can be made between the case law of administrative courts and civil courts. Tax cases are not discussed here as access to tax courts is limited by law to parties who are addressed by the decisions of tax authorities.¹⁵⁹ Therefore, an environmental NGO shall not be heard by a tax court on the basis of its environmental object.

Administrative courts – introduction

In administrative proceedings, the circle of admissible parties is delimited by, first, applying the ‘interested party’ concept, and second, the ‘relativity requirement’.¹⁶⁰ Failure to fulfil the interest or the relativity requirement – which can take several and different forms depending on the procedural context – may lead to the inadmissibility of the claim(s).

- (i) The **interested party concept** entails that a party must be directly affected by the challenged decision (i.e., that it has a legitimate interest). In principle, a foundation or an association that, according to its articles of association, defends the interest of certain individuals qualifies as an interested party when that interest is at stake.¹⁶¹ Notably, in non-State aid related cases, environmental organizations have been heard by administrative courts (while often a thorny issue).¹⁶²
- (ii) The **relativity requirement** implies that a party can only rely on a provision if it aims to protect the party invoking it. In State aid cases this second requirement

¹⁵⁶ In Dutch trade journals criticism was expressed on this ruling, e.g. N. Saanen, ‘De uitspraak Ridderstee Holiday: een drieluik van selectiviteit, handelsverkeer en zorgvuldigheid’, *NtEr* 2013, afl. 7, p. 240-247; A.J.C. de Moor-van Vugt, ‘Zaak Ridderstee’, *SEW* 2015/11, or A.H.G. van Herwijnen, ‘De Europese Commissie en de nationale rechter in staatssteunzaken: welke mate van inhoudelijke toetsing?’, *NtEr* 2015, afl 7, p. 225-231.

¹⁵⁷ Trade and Industry Appeals Court 29 December 2017, ECLI:CBB:2017:412.

¹⁵⁸ Supreme Court 11 December 2020, ECLI:NL:HR:2020:2007 (*Karmedia*).

¹⁵⁹ Article 26a of the State Taxes Act.

¹⁶⁰ Article 1:2 [Interested party] and 8:69a [Relativity] of the General Administrative Law Act.

¹⁶¹ Article 1:2 paragraph 3 of the General Administrative Law Act.

¹⁶² E.g. in Council of State 28 October 2008, ECLI:NL:RVS:2008:BG3360.

forms an important barrier as interested parties tend to invoke the standstill provision.¹⁶³ In particular, administrative courts have ruled in spatial planning cases that the standstill provision does not serve to protect the interests of local residents of maintaining a good living and working environment.¹⁶⁴ This also applies to associations and foundations which defend such interests.¹⁶⁵

Administrative courts – case law

An application of the *Streekgewest Westelijk Noord-Brabant v Staatssecretaris van Financien* judgement – and a good example of the relativity requirement – can be found in the Division’s ruling on the expropriation of *SNS Reaal and SNS Bank*.¹⁶⁶ This ruling concerned security holders who appealed against the expropriation decision, partly based on the argument that it was in conflict with the standstill provision (para. 11). Referring to the *Streekgewest Westelijk Noord-Brabant v Staatssecretaris van Financien* ruling, the Division ruled that the standstill provision does not protect the interests of security holders of a company to which State aid has been granted (i.e., relativity requirement) (para. 11.1). Therefore, the Division denied the appeal and refrained from submitting preliminary questions to the CJEU (para. 11.1).

It follows that the judgement *Streekgewest Westelijk Noord-Brabant v Staatssecretaris van Financien* has not yet resulted in an expansion of ‘interested parties’ that have standing before an administrative court in State aid proceedings.

Civil courts – introduction

In civil proceedings, the claimant’s lack of interest can also lead to the inadmissibility of the claim. However, civil courts apply a different set of procedural laws and tend to be less inclined to rule that a claim is not admissible. The norm for admissibility is different: it is not required that the party is directly affected by the decision that is being challenged; instead, it is required that the claimant has sufficient procedural interest.¹⁶⁷ In addition, foundations or associations with full legal capacity that, according to its articles of association, have the statutory objective and goal to protect specific interests, may bring before the competent civil court a legal claim that intends to protect similar interests of other persons.¹⁶⁸ This – in principle – opens the door for foundations and associations to invoke that State aid is illegal in the context of a specific measure in civil proceedings.

The *Urgenda* case provides a favourable context. In this case, the Supreme Court held that the government has a legal duty to reduce emissions in line with its human rights

¹⁶³ Article 108 paragraph 3 of the Treaty on the Functioning of the European Union.

¹⁶⁴ Council of State 2 November 2016, ECLI:NL:RVS:2016:2892, paragraph 12.6.

¹⁶⁵ Council of State 15 November 2017, ECLI:NL:RVS:2017:3126, paragraph 5.3; Council of State 10 April 2019, ECLI:NL:RVS:2019:1105, paragraph 23.3; Council of State 29 May 2019, ECLI:NL:RVS:2019:1781, paragraph 161.1.

¹⁶⁶ Council of State 25 February 2013, ECLI:NL:RVS:2013:BZ2265 (*SNS Reaal en SNS Bank*).

¹⁶⁷ Article 3:303 of the Dutch Civil Code.

¹⁶⁸ Article 3:305a paragraph 1 of the Dutch Civil Code.

obligations.¹⁶⁹ Although the proceedings did not involve State aid, the case is a good example of the application of the procedural rules by Dutch civil courts in granting standing to environmental NGOs.¹⁷⁰

There have been civil proceedings regarding State aid in which courts have dealt with standing of non-governmental actors. The table below summarises four cases, which are then discussed in more detail.

STANDING OF FOUNDATIONS BY CIVIL COURTS		
Court	Name	Ruling
Court of Appeal of The Hague (2010)	<i>Koppenhinksteeg</i>	Foundation's claim relying on standstill provision admissible, not because of its position as representative of squatters, but because it participated in the sales procedure.
District Court of Dordrecht (2009)	<i>Polders Graafstroom</i>	Environmental foundation's claim relying on standstill provision admissible, because the foundation serves to protect similar interest of individuals and it promotes these interests.
Court of Appeal of Den Bosch (2018)	<i>Maankwartier</i>	The relativity requirement also plays a role in civil proceedings.
Supreme Court (2020)	<i>Stichting Karmedia</i>	Only the circle of individuals identified that can invoke the standstill provision (108 lid 3 TFEU), can rely on the standstill provision in national procedures. The situation of the foundation must be directly affected by the unlawful granting of State aid.

Civil Courts – discussion of case law

The first example of a case in which a foundation's claim was admissible, is the case *Koppenhinksteeg*.¹⁷¹ In this case the Municipality of Leiden claimed eviction of squatted premises that it had previously sold (para. 3). In the counterclaim, the Koppenhinksteeg Foundation argued that the municipality was prohibited from giving effect to agreement under which it had sold the premises to a third party because it involved non-notified State aid (para. 4). In response, the municipality held, referring to the *Streekgewest Westelijk Noord-Brabant v Staatssecretaris van Financiën* judgement, that the foundation, as a representative of the squatters, was not entitled to rely on the standstill provision (para. 14). The Court of Appeal of The Hague rejected the municipality's argument, and considered that the Koppenhinksteeg Foundation did not make its claim based on the standstill provision as a representative of the squatters, but on the ground that it had participated in the sales procedure of the premises (para. 15). According to the court it was not a priori clear that the foundation had no sufficient procedural interest to suspend the current sale procedure in its position as co-bidder (para. 15). Although the case does serve as evidence that foundations can have standing when representing the interests of individuals, it does demonstrate that a party can have sufficient procedural interest in

¹⁶⁹ Supreme Court 11 December 2020, ECLI:NL:HR:2020:2007.

¹⁷⁰ Supreme Court 11 December 2020, ECLI:NL:HR:2020:2007, paragraphs 5.9.1-5.9.3.

¹⁷¹ Court of Appeal of The Hague 18 February 2010, ECLI:NL:GHSGR:2010:BL7630.

invoking the standstill provision in civil proceedings despite it not being directly affected by the alleged State aid.¹⁷²

A similar decision was made in the case *Polders Graafstroom*.¹⁷³ The Foundation for the Preservation of Polders Graafstroom's objectives, according to its articles of association, were to preserve, protect and improve the quality of the Dutch nature area 'Het Groene Hart' in the region Alblasserwaard, to protect and improve the environment and to prevent the establishment of gas compressor station within the Dutch nature area.¹⁷⁴ The District Court of Dordrecht ruled that the foundation was admissible in its claim that the standstill provision had been breached by the municipality (para. 4.2). Unfortunately, the admissibility of the claim was not extensively disputed, and thus, the decision by the court (in first instance) was thinly motivated and no references to European or national case law were made.

The third case, *Maankwartier*, illustrates that the relativity requirement also applies in civil proceedings.¹⁷⁵ Therefore, if private parties other than competitors and levy payers invoke the standstill provision, but it is established that an appeal to the State aid rules is not intended to reverse the unlawful State aid, the civil courts will reject a claim. The case concerned a real estate company and a foundation for the preservation of monuments building who, relying on the standstill provision, claimed that a purchase agreement for an office space concluded by the Municipality of Heerlen and a property developer Maankwartier was null and void, because the purchase price would not be in line with market conditions (para. 3.1-3.2). The court rejected the initial argument of the municipality and Maankwartier that the claimants had no standing as they were not direct competitors, by considering that the procedural interest of parties must generally be presumed, and that it is only absent by exception (para. 3.6.3). Therefore, the claimants – who both owned office space in the city – had sufficient procedural interest (para. 3.6.5). The court further considered that, to the extent the defence concerned the relativity requirement, this could come up for discussion at a later stage (regarding the materiel question whether the aid was unlawful), adding that the parties' statements did not give the court any reason to rule at this stage (admissibility) that the claims were inadmissible because of a lack of relativity (para. 3.6.6). In the context of relativity, although the violated norm does not serve to protect against the damages as suffered by the injured party, liability can nevertheless exist when an underlying general norm has been violated.¹⁷⁶

In the most recent case, *Stichting Karmedia*, the Supreme Court ruled that a foundation's claim is not automatically admissible in a civil lawsuit concerning alleged illegal State aid if it, according to its articles of association, acts as a promoter of the public interest (para. 3.1.4).¹⁷⁷ The case concerns the Karmedia Foundation which, according to its articles of association, promotes the 'public interest of promoting fair competition' and aims (among

¹⁷² Metselaar 2016, p. 206.

¹⁷³ District Court of Dordrecht 12 May 2009, ECLI:NL:RBDO:2009:BI3617.

¹⁷⁴ In accordance with Article 3:305a of the Dutch Civil Code.

¹⁷⁵ Court of Appeal of Den Bosch 18 December 2018, ECLI:NL:GHSHE:2018:5278.

¹⁷⁶ In Dutch: *Correctie Langemeijer*. About: D.A. van der Kooij, *Relativiteit, causaliteit en toerekening van schade* (diss. EUR), Deventer: Wolters Kluwer 2019, p. 275.

¹⁷⁷ Supreme Court 11 December 2020, ECLI:NL:HR:2020:2007.

other things) to ‘ensure compliance with State aid rules’ (para. 2.1). The foundation initiates proceedings before the District Court of Rotterdam arguing that the municipality granted State aid to a project developer (para. 2.3). The District Court and the Court of Appeal, referring to the judgement *Streekgewest Westelijk Noord-Brabant v Staatssecretaris van Financien*, both find that the foundation does not have sufficient procedural interest by considering that the interests of the foundation go far beyond the scope of legal protection of the standstill provision.¹⁷⁸ The Supreme Court dismissed *Stichting Karmedia*’s appeal, finding that the Court of Appeal did not make an error of law in its assessment of the admissibility of the foundation’s claims (para. 3.1.4). It follows from *Karmedia* that only the circle of individuals identified by the Court of Justice that can invoke the standstill provision, can rely on the standstill provision in national procedures. The Supreme Court adds that situation of the foundation must be specifically affected by the unlawful granting of State aid (3.1.3). The result of *Stichting Karmedia* is that NGOs, generally, cannot initiate a private enforcement procedure if they do not qualify as competitors and/or do not act on behalf of competitors (or as levy-payers).

Conclusion

The short answer to question 4 is therefore: yes, national courts have recognised standing of parties whose competitive position is not affected by the grant of illegal aid in *Polders Graafstroom*. However, the ruling of the Supreme Court in *Karmedia* severely restricts standing in future cases. Foundations that do not qualify as competitors cannot initiate a private enforcement procedure relying on the standstill provision if they do not qualify as or act on behalf of competitors. One way to address this obstacle could be to also rely on the State’s liability arising from an unlawful act (article 6:162 of the Dutch Civil Code): the State aid is unlawful (in violation of Article 107 paragraph 1 and 108 paragraph 3) and the issuing authority is acting unlawfully by providing aid to activities that undermine environmental interests. The scope of protection of the standstill provision will still play a role in the assessment of unlawful aid, but might prevent the court denying the foundation’s standing. The table below summarizes the differences of three key concepts between civil and administrative courts.

STANDING - SUMMARY		
Concept	Civil Court	Administrative Court
Interest	A claimant must have sufficient procedural interest, article 3:305 of the Dutch Civil Code.	A claimant must be an ‘interest party’ in the meaning of article 1:2 of the General Administrative Law Act.
Relativity	Not important for standing – relativity will be considered in the assessment of unlawful aid.	Important for standing – the provision must seek to protect the interest of the claimant.

¹⁷⁸ Court of Appeal of The Hague 16 July 2019, ECLI:NL:GHDHA:2019:1806, paragraph 9-11.

Foundation	In principle, a foundation representing the interests of individuals can be heard, article 3:305a of the Dutch Civil Code. It follows from <i>Stichting Karmedia</i> that the situation of the foundation must be specifically affected by the unlawful granting of State aid. Standing of non-competitor NGOs has been restricted significantly.	In principle, a foundation representing the interests of individuals can be heard, article 1:2 paragraph 2 of the General Administrative Law Act. However, it is not unlikely that administrative courts shall follow the course of <i>Stichting Karmedia</i> , possibly through the relativity requirement.
------------	---	--

5. If the answer to question 4 is “yes”, do environmental NGOs have standing before national administrative bodies (if any) or courts competent in State aid matters to challenge government measures for alleged illegal State aid? Please reply with “yes”, “no” or “unclear”.

Yes, for civil courts and unclear for administrative courts. In light of the separate procedural rules and the case law discussed in question 4, this answer depends on the type of court. In theory, standing of environmental NGOs can be recognised by both administrative and civil courts. In practice, however, there have been but a few civil proceedings and no administrative proceedings in which the claims of a foundation were found admissible in State aid-related matters.

Administrative courts

While the standing of environmental organisations has been recognised by administrative courts in other cases, as discussed in question 4, there has not been an admissible claim in a case related to State aid. In that context, both the interested party and the relativity requirement are important obstacles. In particular, the relativity requirement in relation to the standstill provision creates an important barrier for the admissibility of State aid claims. As a result of the *SNS Reaal v SNS Bank* judgement, it is not unlikely that an administrative court will rule that the standstill provision does not aim to protect environmental issues.¹⁷⁹ However, this might be in conflict with the provisions of the Aarhus Convention.¹⁸⁰ In this context, it should be noted that the Supreme Court, although in civil proceedings, mentioned the Aarhus Convention explicitly when dealing with the standing of foundation *Urgenda*.¹⁸¹

Civil courts

As discussed in the answer to question 4 and 6, *Polders Graafstroom* is an example of a case in which the standing of a foundation with an environmental object was recognised by a civil court. Nevertheless, the sufficient procedural interest requirement should not be

¹⁷⁹ Council of State 25 February 2013, ECLI:NL:RVS:2013:BZ2265 (*SNS Reaal en SNS Bank*).

¹⁸⁰ Article 9 paragraphs 3 and 4 of the Aarhus Convention.

¹⁸¹ Supreme Court 20 December 2019, ECLI:NL:HR:2019:2006, paragraph 5.9.2.

taken too lightly in State aid-related cases, especially given the recent judgment of the Supreme Court in *Stichting Karmedia*.¹⁸²

- 6. If the answer to question 5 is “yes”, which criteria do NGOs need to fulfil to be granted standing (some examples of criteria may include registration / accreditation with a specific body; number of members; certain period of existence; requirements as to its statutory purpose or form of incorporation; relationship between its activities and the aid challenged etc.)? Are the criteria different for foreign NGOs (i.e. not registered in the country where the aid is challenged)?**

Civil Proceedings

The criteria for the admissibility of claims brought by foundations or associations with a bundled interest in civil proceedings are laid down in Article 3:305a of the Dutch Civil Code. In general, there are three main criteria that a non-profit¹⁸³ environmental NGO must meet when bringing claims in civil proceedings:

- (i) in the first place, the organisation must be a foundation or association with legal personality (i.e., an organisation whose articles of association are included in a notarial deed).¹⁸⁴ The articles of association must include the aim of the organisation and a reference to the interests it promotes and represents.
- (ii) second, the organisation must be ‘sufficiently representative’ with respect to the constituency and the size of the claims represented.¹⁸⁵ For environmental organisations, the requirement will be met if it is clear from the organisation's actual activities that it has previously promoted environmental interests (and can therefore be considered representative).
- (iii) third, prior to bringing the claim to court, the organisation must have had, given the circumstances, sufficient negotiations about the dispute with the defendant.¹⁸⁶ It follows that (environmental) organisations must have approached the company or municipality before proceedings are initiated.¹⁸⁷ This criterion also implies that if negotiations are ongoing, unexpected claims before a court will not be heard. If a defendant does not respond to a request for negotiations, the criterion is assumed to have been met.

In 2020, new criteria were added to Article 3:305a of the Dutch Civil Code to ensure that the organisations claiming damages on behalf of a large group of injured parties were sufficiently representative of these parties. According to the new criteria, the foundation or association must have: (a) a supervisory body; (b) appropriate and effective mechanisms for participation or representation in its decision-making process; (c) sufficient resources to bear the costs of bringing an action; (d) an openly accessible webpage which contains

¹⁸² Supreme Court 11 December 2020, ECLI:NL:HR:2020:2007, paragraph 3.1.4.

¹⁸³ According to Article 3:305a paragraph 3 sub a of the Dutch Civil Code, the organisation must be non-profit (i.e. the members of the board of the organisation may not have a profit motive with the organisation).

¹⁸⁴ Article 3:305a paragraph 1 of the Dutch Civil Code.

¹⁸⁵ Article 3:305a paragraph 2 of the Dutch Civil Code.

¹⁸⁶ Article 3:305a paragraph 3 sub c of the Dutch Civil Code.

¹⁸⁷ District Court of Arnhem 10 October 2007, ECLI:NL:RBARN:2007:BB5975.

important information; and (e) sufficient experience and expertise with regard to instituting and conducting the legal action.¹⁸⁸ Additionally, the foundation or association is also required to prepare and publish a management report.¹⁸⁹

These new requirements apply in principle to all foundations and associations bringing a claim in a collective action, unless they fall under the ‘idealistic purpose’ exception. Under this exception, the court may declare a legal entity admissible – without having to comply with the additional governance requirements – if the legal action is brought with an idealistic purpose and a limited financial interest, or if it is otherwise justified by the nature of the claim.¹⁹⁰ When this exception is applied, the legal action cannot seek damages. Therefore, in general, when seeking prohibition or injunction or a declaratory judgment, a non-profit environmental organisation will fall under this exception, and thus, will not have to comply with the newly added corporate governance requirements.¹⁹¹ For the avoidance of any doubt, the exception only applies to the governance requirements and the obligation to prepare and publish a management report, and not to the other three obligations.

Civil Proceedings – Application of criteria

As discussed in the answers to the questions 4 and 5, there have not been many instances in which a foundation or association brought a claim to a civil court in State aid cases. Nevertheless, the cases do show how courts apply the criteria for the admissibility of a collective action. In *Polders Graafstroom* the environmental foundation’s claims were admissible, but the foundation’s aim (among others) was to protect the environmental interest of the people that live near the area it was trying to protect. However, the judgement in *Stichting Karmedia* shows that the claims of a foundation are not automatically admissible if it acts as a promoter of the public interest. In that case, the foundation’s aim goes beyond the scope of legal protection provided under the standstill provision.

In this context it must be emphasised that, in its assessment of admissibility, a court will evaluate whether the organisation protects similar interests of other persons, and whether the organisation’s activities show that it previously protected the environmental interest (and can therefore be considered as representative of that interest). In the case *Milieudefensie v Shell*, the District Court and the Court of Appeal both ruled that Milieudefensie’s claims with regards to the pollution of the Niger delta, were admissible, considering that according to its articles of association it promoted global environmental protection, it had conducted campaigns aimed at stopping the pollution, and that the interests of the individuals were adequately safeguarded.¹⁹² Although this is not a State aid-related case, it serves as a good example of the application of procedural rules by Dutch civil courts to recognise the standing of environmental organisations, even when its aim is broad.

¹⁸⁸ Article 3:305a paragraph 2 sub a-e of the Dutch Civil Code.

¹⁸⁹ Article 3:305a paragraph 5 of the Dutch Civil Code.

¹⁹⁰ Article 3:305a paragraph 6 of the Dutch Civil Code.

¹⁹¹ See the Parliamentary History of the amendment: *Kamerstukken II 2016/17*, 34 609, nr. 3, p. 29.

¹⁹² District Court of The Hague 30 January 2013, ECLI:NL:RBDHA:2013:BY9850, paragraphs 4.12-4.15; Court of Appeal of The Hague 29 January 2021, ECLI:NL:GHDHA:2021:132, paragraphs 3.1-3.4.

Finally, the same rules apply to foreign NGOs, and no additional barriers to admissibility of their claims exist.¹⁹³ However, the legal claim must have a sufficiently close connection with the jurisdiction of the Dutch courts.¹⁹⁴

Administrative proceedings

While the discussed criteria of Article 3:305a of the Dutch Civil Code do not apply in administrative proceedings, the main principles are similar. First, an organisation must have legal personality, and its articles of association must contain its aim and the (general) interests it represents.¹⁹⁵ In contrast with civil cases, administrative courts are less comfortable recognizing standing of organisations with (functionally and territorially) broad objectives.¹⁹⁶ This is due to the requirement that a party must be ‘directly’ affected by the challenged decision. The second requirement is that the organisation’s activities must be adequately devoted to promoting the interests it claims to represent.¹⁹⁷ In other words, the activities of the organization need to be sufficiently connected with the relevant interests of the claim in the proceedings. In an example of a case in which an environmental foundation was granted hearing, the environmental activities included lecturing, bringing important issues to the attention of the Ministry and local authorities, participating in consultations regarding environmental issues, and advising other environmental organization. This includes work independent of legal proceedings or their preparation and not exclusively commissioned work.¹⁹⁸

7. Has an NGO with an environmental object previously brought an action against a State aid measure or scheme in the Member State and been recognised by the courts as being entitled to do so? Please reply with “yes” or “no”. If the answer is “yes”, please also detail the context and the outcome of the judgement(s) concerned (admissibility and merits of the action).

Yes, an action against a State aid measure brought by an NGO with an environmental object has been recognised by a civil court in *Polders Graafstroom*.¹⁹⁹ The admissibility of the foundation is discussed in question 5. It must be reiterated that the admissibility of the claim was not extensively disputed, and thus, the decision by the court (in first instance) was thinly motivated and no references to European or national case law were made. However, the ruling of the Supreme Court in *Karmedia* restricts standing in future cases.

The context of the case is as follows. The Dutch company *Gasunie*, fully owned by the State, intends to build gas compressor station as part of the expansion of the national gas transport network. To that end, it had acquired a plot of land in the *Groene Hart*, a green and open central area near the Randstad, an conurbation that comprises the Netherlands’

¹⁹³ E. Bauw, ‘VIII.6.6.2 Vorderingen door of tegen milieuorganisaties’, in: C.J.J.M. Stolker (red.), *Groene Serie Onrechtmatige daad*, Deventer: Wolters Kluwer.

¹⁹⁴ Article 3:305a paragraph 3 sub b of the Dutch Civil Code.

¹⁹⁵ Article 1:2 paragraph 3 of the General Administrative Law Act.

¹⁹⁶ E.g. Council of State 28 May 2008, ECLI:NL:RVS:2008:BD2647.

¹⁹⁷ Article 1:2 paragraph 3 of the General Administrative Law Act.

¹⁹⁸ Council of State 28 October 2008, ECLI:NL:RVS:2008:BG3360, paragraphs 2.3-2.4.

¹⁹⁹ District Court of Dordrecht 12 May 2009, ECLI:NL:RBDOR:2009:BI3617.

four biggest cities.²⁰⁰ The foundation *Polders Graafstroom* claimed that the acquisition of land constituted State aid and that the standstill provision had been breached. In its examination of the transaction, the court found that there had been no intervention by the State or through State resources, and that it was not clear that an advantage on a selective basis was given. As a result, it dismissed the foundation's State aid claim.²⁰¹

- 8. Have national courts already relied on / referred to point 27 of the revised Commission's Notice on the enforcement of State aid law by national courts recommending to grant standing to NGOs? Please reply, to the best of your knowledge, with "yes" or "no". If yes, please also provide a short summary as well as a reference to where the relevant judgement can be accessed.**

No, national courts have not relied on or referred to point 27 of the revised Commission's Notice in any (published) judgement.

Available grounds

- 9. Can a claimant (any category) raise claims related to violations of EU or national environmental law by an aid measure or an activity in support of an action aiming at challenging the grant of aid? Please reply with "yes", "no" or "no data".**

No. The question is understood as: If a claimant challenges an aid measure on the basis of State aid law, can he support his action with claims related to environmental law? This question is in particular relevant in administrative proceedings, as the government has taken official decisions, which are based on or need to comply with other relevant national and European law.

In administrative proceedings, any interested party is allowed to submit an objection to an aid measure or activity that they believe violates environmental laws. The decision taken by authorities are often based on – or have to comply with – national and European law. If the objection is rejected, the interested party can appeal the decision to a court. Similarly, they can object to the decision that they believe violates State aid law. These objections, notwithstanding the fact that they can be made at the same time, should be seen as two separate grounds.

In this light, it should be noted that national courts cannot assess the compatibility of State aid with the internal market, and shall therefore not hear environmental arguments implying that the aid is non-compatible in a State aid-related action. On top of that, if the standstill provision is being used to annul a decision that violates environmental law, the claim will be deemed inadmissible (see answers to questions 3-8).

²⁰⁰ Amsterdam, Rotterdam, The Hague, and Utrecht.

²⁰¹ District Court of Dordrecht 12 May 2009, ECLI:NL:RBDOR:2009:BI3617, paragraph 4.3-4.10.

10. Are there examples of cases where such claims were raised (if so please detail the context and outcome)?

No, there are no example of cases where such claims were raised.

11. More generally, are there instances of claimants (any category) alleging, in support of an action challenging an aid measure or scheme, that a State aid measure or activity breached EU or national law that is not directly State aid law (other than environmental law, which is covered by question 9 above, such as law on public procurements, planning law, tax law etc.)? Please detail the context and the outcome (competence of the courts, merits of the claim and potential test applied by the court, potential reference for preliminary ruling to the CJEU under Article 267 TFEU)?

With regard to public procurements, there are no known cases to date (yet) where an NGO and/or interest group stood up against an award in which environmental (interests) were central. However, there are examples in case law of cases in which an interest group is part of the proceedings through intervention or joinder. Intervention is the procedure in which a third party joins as an independent litigant in a dispute already pending between (two) other parties (articles 217 DCCP). However, if this third party wishes to join one of the other litigants, this is called joinder (217 DCCP). In this context, a party must make it plausible that it has a sufficient interest in the joinder and that joinder does not impede the expeditious disposal of the lawsuit. This also does not create a conflict with due process in general.²⁰²

When it comes to planning law a claimant usually has to rely on the procedure with the administrative court. See the answers to questions 4.5 and 6. Furthermore, the new planning act '*Omgevingswet*' becomes effective as from 1 January 2024.²⁰³ E.g. an active participation of NGO's in the objection-phase is a requirement to filing an appeal.

12. Have there been any instances in the Member States of a national court referring the validity of a Commission's State aid decision to the CJEU under Article 267 TFEU between 1 January 2019 and 31 December 2022?

No, there are no instances in the Netherlands of a national court referring the validity of a Commission's State aid decision to the CJEU between 1 January 2019 and 31 December 2022.

²⁰² E.g. Court Den Bosch 28 October 2014, ECLI:NL:GHSHE:2014:2804 and ECLI:NL:GSHE:2015:1697, in which a foundation serving interests of patients with a colostomy bag was allowed as a joinder.

²⁰³ More information can be found here: <https://www.rijksoverheid.nl/onderwerpen/omgevingswet>

Procedural costs risks

13. If the answer to question 5 is “yes”, what are the procedural costs and potential adverse costs to be incurred by an NGO for bringing a State aid-related action before a national court, both in case the challenge is ultimately successful and if it unsuccessful?

The procedural costs and potential adverse costs that an NGO may incur for bringing a State aid-related action before a national court can vary depending on a number of factors. The following procedural costs should be considered:

- (i) **The bailiff’s fees:** the cost of servicing the writ of summons to the opposing party. These fees are relatively low.
- (ii) **Legal fees:** the costs of hiring a lawyer to represent the NGO in court, which also vary depending on the complexity of the case. These fees make up the biggest part of the total cost. Note that pursuant to the rules of the Dutch Bar Association, Dutch lawyers are not allowed to work on the basis of contingency fees that depend entirely on the outcome of the case.
- (iii) **Expert fees and translation costs:** if the NGO needs to hire an expert witness to provide testimony, or if their documents or evidence are not in Dutch and need to be translated, it can incur additional (significant) fees.
- (iv) **Court fees:** costs of the court, which are payable as a contribution to the costs of the proceedings before a court. They have to be paid in advance to the court that will be hearing your case.

If the challenge is unsuccessful, the NGO may be required to pay the legal fees of the opposing party, as well as their own legal fees and the costs of the court. Note that only fixed rate of the legal fees, which depends on the complexity of the case, will be awarded – unless the NGO’s challenge is found to be frivolous or vexatious. The fixed rate is typically but a fraction of the actual costs. If the challenge is successful, however, the NGO will be compensated for their legal fees (by the fixed rate), and the opposing party will be required to pay the costs of the court.

Remedies

14. In case the reply to questions 4 and/or 5 is yes, what remedies are available to non-competitor applicants before an administrative body (if any) or a court in case of breach of environmental law by an aid measure or by the activity?

The breach of environmental law should be seen as detached from the breach of State aid law. This section discusses what remedies are available to non-competitor applicants in the national enforcement of *State aid* law. It is worth reiterating that standing is a problematic obstacle for NGOs in the private enforcement of State aid law.

In the Netherlands, several remedies are available to applicants before an administrative body or a court:

- (i) **Annulment of decision or contract.** Under administrative law, a successful objection (or judicial appeal thereafter) against the decision, in principle, leads to

annulment or alteration of the decision. In civil proceedings, the court may (partially) nullify the contract in which the aid was granted through a declaration of law.

- (ii) **Prevention of implementation and termination.** Where the aid measure granted in violation of the standstill provision has not yet been implemented, courts may prevent its implementation, either by suspending it or by terminating it.
- (iii) **Recovery of aid.** When the unlawful aid has already been paid to the beneficiary, the court may, in principle, order the full recovery of the unlawfully paid amount.
- (iv) **Damages.** Courts may also be required to adjudicate on claims for compensation for damages caused to third parties by unlawful State aid. Under Dutch law, State aid granted in breach of the standstill provision may constitute as a wrongful act.²⁰⁴ If successful, such claims provide the claimants with direct financial compensation for the loss suffered. There are, however, no cases in which compensation of the losses due to unlawful State aid was included. Furthermore, the causal link between damage suffered and a violation of State aid law is difficult to prove in court.²⁰⁵ Also, note that claiming damages as a foundation or association may lead to inadmissibility (see question 8).
- (v) **Interim measures.** Courts may take interim measures where this is appropriate to safeguard the rights of individuals and the direct effect of the standstill provision. Interim measures can either be claimed in (separate) preliminary relief proceedings, or in the main action in a claim for preliminary relief, which – when granted – is valid until the end of the proceedings.²⁰⁶

Overall, remedies available to non-competitor applicants in the Netherlands will depend on the dispute. It should be noted that standing in civil courts is assessed in relation to the nature of the remedy (see questions 4-8). Thus, an applicant's remedy may not be heard by a court due to a lack of procedural interest. An action for a declaration of law that the measure constitutes as State aid (without asking the court a remedy) is also likely to fail due to a lack of procedural interest.²⁰⁷

Transparency

15. How can third parties find out about possible planned, illegal or incompatible State aid from official sources? Are there national registers? What publicity is given to the granting of aid and to its notification to the EU Commission?

In the Netherlands, information about possible planned, illegal or incompatible State aid may be available from various official sources. There are several ways in which third parties can find out about State aid:

²⁰⁴ Article 6:162 of the Dutch Civil Code.

²⁰⁵ Metselaar 2016, p. 492.

²⁰⁶ Articles 254 paragraph 1 and Article 223 of the Dutch Civil Code of Procedure.

²⁰⁷ Opinion of AG Keus 18 January 2013, ECLI:NL:PHR:2013:BY0543, paragraph 2.83.

- (i) **Transparency Aid Module:**²⁰⁸ A transparency obligation applies to all decentralised authorities granting State aid, which implies that decentralised authorities provide information on individual State aid measures via the State Aid Transparency Aid Module ('TAM'). The register provides information on the beneficiary, the amount and form of aid, the legal basis for the aid, and the date of notification to the European Commission. This can be a useful resource for third parties to check whether a particular measure has been notified and authorised by the European Commission.
- (ii) **Website of local authorities:** In case of services of general economic interest (SGEI), regional and local authorities have specific publicity requirements for granted aid. These authorities are required to publish information on their website about the measure, including the name of the beneficiary, the amount and form of aid, and the legal basis for the aid. This information must be made public within six months of the grant being made. As the Netherlands is heavily decentralised, most information on State aid measures is published on regional websites.
- (iii) **Dutch news** forms an important source of information for third parties to keep up to date with planned State aid measures. Big schemes or measures are likely to be picked up by the media. Most relevant sources in this context are – only available in Dutch – *Het Financieele Dagblad* and the *NRC*.²⁰⁹
- (iv) **TenderNed**²¹⁰ is the procurement system of the Dutch government, which allows contracting authorities to publish their announcements on a platform. The application allows tender procedure to be fully digital. These announcements allow third parties to keep up to date with planned governmental projects.

The table below lists all twelve Dutch provinces with a link to their website (and granted State aid).

DECENTRALISED SOURCES FOR STATE AID	
Province	Official Website
Drenthe	https://www.provincie.drenthe.nl/
Flevoland	https://www.flevoland.nl/ Kennisgevingen staatssteun - Provincie Flevoland
Friesland	https://www.fryslan.frl/
Gelderland	https://www.gelderland.nl/ https://www.gelderland.nl/subsidies/subsidies-met-staatsteun
Groningen	https://www.provinciegroningen.nl/ https://www.provinciegroningen.nl/beleid-en-documenten/staatssteun/
Limburg	https://www.limburg.nl/ https://www.limburg.nl/actueel/kennisgevingen/
Noord-Brabant	https://www.brabant.nl/ Subsidie bekendmakingen staatssteun - Provincie Noord-Brabant
Noord-Holland	https://www.noord-holland.nl/ Subsidieregister en kennisgeving staatssteun - Provincie Noord-Holland
Overijssel	https://www.overijssel.nl/

²⁰⁸ European Commission, 'State Aid Transparency Award Module (TAM)', accessible via: webgate.ec.europa.eu/competition/transparency/internal/confirmRegistration.

²⁰⁹ Het Financieele Dagblad, accessible via: fd.nl; NRC, accessible via: www.nrc.nl.

²¹⁰ TenderNed: 'Aankondigingen', accessible via: <https://www.tenderned.nl/cms/en/english/tenderned-dutch-governments-online-tendering-system>.

	<u>Staatssteun (kennisgeving) - Loket provincie Overijssel</u>
Utrecht	<u>https://www.provincie-utrecht.nl/Kennisgevingen-provinciale-steenmaatregelen provincie Utrecht (provincie-utrecht.nl)</u>
Zeeland	<u>https://www.zeeland.nl/ https://www.zeeland.nl/loket/publicatie-steenmaatregelen</u>
Zuid-Holland	<u>https://www.zuid-holland.nl/</u>

Overall, there are various ways in which third parties can find out about State aid in the Netherlands. The State aid register and the Dutch newspapers are useful sources of information, and the publicity requirements for national, regional and local authorities ensure that some information is made public about aid that is granted at decentralised all governmental levels. However, it's important to note that not all State aid may be publicly disclosed, and in some cases, third parties may need to rely on other sources of information or legal avenues to challenge the legality of aid

16. Please provide details of any national legislation that gives third parties access to documents on State aid granted to beneficiaries that are held by national public authorities.

The Dutch Open Government Act

In the Netherlands, the relevant legislation that gives third parties access to documents on State aid granted to beneficiaries that are held by national public authorities is the Dutch Open Government Act ('DOGA'). Under the DOGA, anyone can request access to information held by public authorities, including documents related to State aid.²¹¹ The requester does not have to state his interest, and the authority is required to respond to the request within four weeks.²¹² If the authority refuses to provide access to the information, the requester can appeal the decision to an administrative court.

Information can be withheld if there is a valid ground for refusal. The Act distinguishes between absolute and relative grounds for refusal. If the information falls under an absolute ground for refusal, it is not disclosed.²¹³ However, if the information falls under a relative ground for refusal, the public interest in disclosing the information is weighed against the specific interest the refusal ground seeks to protect.²¹⁴ This balancing of interests determines whether disclosure should be withheld. The absolute and relative grounds for exemption do not apply to environmental information on emissions into the environment.²¹⁵

²¹¹ Article 4.1 of the Dutch Open Government Act, the Act can be found here: <https://wetten.overheid.nl/BWBR0045754/2023-04-01>

²¹² Article 4.1 paragraph 3 and Article 4.4 paragraph 1 of the Dutch Open Government Act.

²¹³ Article 5.1 paragraph 1 of the Dutch Open Government Act.

²¹⁴ Idem, paragraph 2.

²¹⁵ Idem, paragraph 7. This paragraph is an implementation of Article 4 paragraph 4 Aarhus Convention and Article 6 paragraph 1 Regulation 1367/2006, which set out that grounds for exemption or refusal of disclosure are to be interpreted restrictively when the information requested relates to emissions into the environment.

In a State aid related context, the most important (relative) ground of refusal is the protection of competitively sensitive business and manufacturing information. The authority, and an administrative court if an appeal is made, weigh the interests involved and make a decision or ruling accordingly.

The Article 843a DCCP procedure

Alternatively, pursuant to Article 843a of the DCCP, a party with a legitimate interest may request from another party a copy, extract or inspection of certain documents regarding a legal relationship to which it is a party. A party may submit the claim during pending proceedings or in separate proceedings. A rejection of a request under Article 4.2 of the DOGA does not prevent a request under Article 843a of the DCCP.²¹⁶ Article 843a of the DCCP lays down three requirements that need to be fulfilled before the court will uphold the claim for disclosure.

- (i) **Legitimate interest.** An applicant must have a legitimate interest in the disclosure, and it is up to them to provide facts and circumstances that substantiate his interest. The scope of the requirement is extensive and may also include gathering information to prepare a possible claim. There is no specific standard for determining when this requirement is met, and case law is extremely casuistic.
- (ii) **Legal relationship.** The second requirement is that the disclosure must relate to a legal relationship – including a relationship based on a wrongful act – to which the requesting person is a party. The existence of the legal relationship must be sufficiently plausible, according to the Supreme Court.²¹⁷
- (iii) **Specific documents.** The applicant must specify which records are involved (e.g. a particular private document, or particular correspondence). This requirement prevents fishing expeditions – which are not allowed under Dutch law. It is therefore recommended to specify the documents as much as possible, but the required specificity depends on the type of documents. For example, when requesting correspondence on a specific subject, the applicant does not have to specify specific emails.²¹⁸

There are three further restrictions to a request under Article 843a of the DCCP, which are:

- A party holds a duty of confidentiality due to their profession or position, such as doctors, notaries, or lawyers, and the documents are protected by their professional confidentiality;
- There are 'compelling reasons' why the document holder should not comply with the disclosure request. The holder of documents must support their claim and their interest in keeping the documents confidential. Whether the claim is compelling is subject to the court's decision.

²¹⁶ Supreme Court 20 December 2002, ECLI:NL:HR:2002:AE3350.

²¹⁷ Supreme Court 10 July 2020, ECLI:NL:HR:2020:1251.

²¹⁸ Supreme Court 26 October 2012, ECLI:NL:HR:2012:BW9244.

- There are sufficient grounds to believe that justice can be served without disclosing the requested documents. For instance, a case in which evidence can also be obtained by questioning a witness.

Only if all of the requirements are met and none of the restrictions apply, the court will grant the request.

Poland

Context

1. Have the public authorities or national courts in the Member State expressed any public opinion or issued any ruling referring to the application of the *Austria v. Commission (Hinkley Point C)* judgment and its implications at national level (e.g. on checks to be performed before or after granting aid, interactions with the EU Commission, or access to justice rules or practices)? If yes, please provide a short summary as well as a reference to where these public opinions or judgements can be accessed.

In the database of judgments of the ordinary courts²¹⁹, the administrative courts²²⁰, the Supreme Court²²¹ and the Constitutional Court²²², there is no indication that shows reference to *Austria v. Commission (Hinkley Point C)*, Case C-594/18P. Also, the paid search engine of judgment (LEGALIS) does not indicate any such references in judicial decisions. A review of government websites²²³ also did not indicate references to this judgment.

Each time the search was by keywords: *Austria v. Commission*, Hinkley, Hinkley Point, C-594/18P, judgment and combinations of these words.

2. Are public consultations organised at national or local level on planned aid measures or schemes? Please specify if this includes all or only certain planned measures or schemes and whether these consultations are open to participation by environmental NGOs. Please provide recent examples of such consultations with the references to the relevant websites.

According to legal requirements (the Rules of Procedure of the Council of Ministers, the Rules of Procedure of Sejm and the Rules of Procedure of Senate), legislation created at national level should be consulted upon. There are situations, which should be regarded as very exceptional, where consultation may be limited in time or scope. However, the practice of recent years shows that these requirements are not respected in a number of cases and practices are used to limit or exclude public consultations by interpreting the rules in a questionable way. Consultation at local and regional level is required in specific cases.

Consultations of governmental acts

There is no separate consultation procedure for acts involving State aid. General rules apply. Public consultation rules are part of the government legislative process. They apply to legal acts adopted by the government.²²⁴ Pursuant to par. 31 of the Regulations of the Council of Ministers²²⁵, referral for consultation, public consultation or opinion of a draft government document takes place after the draft is included in the list of works, and consultations are

²¹⁹ <https://orzeczenia.ms.gov.pl>

²²⁰ <https://orzeczenia.nsa.gov.pl>

²²¹ <http://www.sn.pl>

²²² <https://trybunal.gov.pl>

²²³ <https://www.gov.pl>; www.paa.gov.pl; www.mos.gov.pl

²²⁴ See: <https://www.gov.pl/web/rozwoj-technologie/wez-udzial-w-konsultacjach-publicznych-w-ramach-rzadowego-procesu-legislacyjnego>

²²⁵ <https://isap.sejm.gov.pl/isap.nsf/download.xsp/WMP20130000979/O/M20130979.pdf>

conducted by the body submitting the draft.²²⁶ According to par. 36 of the Regulations of the Council of Ministers, the administrative body proposing the adoption of a specific legal act (law, regulation) and drafts of other government documents, presents it for public consultation. The above provision indicates the positive and negative premises for such referral (positive: the essence of the act, its socio-economic impact, its complexity; negative: the urgency of work on the act). Such a body may additionally refer it to selected social organisations (incl. NGOs) or other stakeholders or institutions to present their views. If there are any additional guidelines (indications) from the Council of Ministers or its subsidiary body on the conduct of consultations, these shall be considered in the consultations in question.

There is a list of organisations put forward for the consultation process.²²⁷ Organisations may be selected from this list for consultation, but this does not mean that another organisation cannot be invited to such consultation. Inclusion on the list is at the request of the organisation. While consulting this list, there are no significant environmental organisations on this list, apart from WWF Poland.²²⁸ Another option to participate in consultations at the government level is to set up a profile on the website of the Government Legislation Centre (PL: Rządowe Centrum Legislacji, RCL) and in the parameters of what organisations want to participate in, define topics related to State aid.²²⁹

In practice, due to the fast pace of the adoption of various pieces of legislation in Poland in recent months, the principles of consultation are respected with some limitations. Sometimes they are of a limited nature, involving only selected organisations or limited time. However, it can be assumed that this is temporary. This is, however, the place in the system where one can obtain knowledge and, having one's own initiative, make comments and participate in the legislative process concerning State aid.

Consultations of local government acts

There is no separate consultation procedure for acts involving State aid. The general rules apply. The basis for conducting public consultations in local governments are the provisions of the acts on: communal self-government of 8 March 1990, powiat self-government of 5 June 1998, voivodeship self-government of 5 June 1998. In accordance with these provisions, local governments may conduct public consultations in cases provided for in the act (issues concerning public aid are not among them) and in other matters important for local communities. The practice, which can be seen by analysing the websites of local government units, is that draft resolutions to be voted at the next session are made public and this is the moment when one can try to raise one's objections as regards public aid.

²²⁶ There are special sections on government websites about organised and completed public consultations for various acts, e.g.: <https://bip.mkidn.gov.pl/pages/legislacja/wykaz-projektow-poddawanych-konsultacjom-publicznym.php>

²²⁷ <https://www.gov.pl/web/rozwoj-technologia/wez-udzial-w-konsultacjach-publicznych-w-ramach-rzadowego-procesu-legislacyjnego> , zakładka „Materiały” – Wykaz podmiotów do wykorzystania w procesie konsultacji publicznych

²²⁸ In terms of environmental protection, for example, it is: Fundacja WWF Polska, Polska Izba Ekologii, Stowarzyszenie „EKOSKOP”, UN Global Compact, Związek Stowarzyszeń Polska Zielona Sieć

²²⁹ <https://legislacja.rcl.gov.pl>

Consultations with public benefit organisations

An example of mandatory consultations at the level of local government units (municipalities, districts, provinces) is the regulation of public benefit organisations and volunteers. Pursuant to Article 5(2) para. 3 of the Act of 24 April 2003 on Public Benefit Activity and Volunteerism²³⁰, public administration bodies (central and local government) are obliged to consult non-governmental organisations and entities listed in Article 3(3) of this Act (public benefit organisations) on draft normative acts in areas concerning the statutory activities of these organisations. Such consultations also take place about the provision of State aid to these organisations.²³¹

Examples of State aid consultations

Draft Regulation of the Minister of Funds and Regional Policy on granting aid by the Polish Agency for Enterprise Development within the framework of the European Funds for Modern Economy 2021-2027 (19 RCL)²³², updated: 13.10.2022. It provides a legal basis for granting financial aid, including State aid and *de minimis* aid, will constitute one of the elements of the FENG Programme implementation system. It will enable the provision of assistance by PARP for i.a. energy efficiency, renewable energy sources, environmental protection above the limits required.

Draft regulation of the Minister of Funds and Regional Policy on the provision of aid for green transformation of cities under the development plan (30 RCL)²³³, updated: 23.9.2022. The regulation is to be an element of the implementation of the National Reconstruction Plan. The entity providing State aid is Bank Gospodarstwa Krajowego (BGK), to which entrepreneurs will submit their applications. The aid will be granted no longer than until 30 June 2026. In the impact assessment, the Minister stated that he estimates that a minimum of 344 investments in urban areas will be supported. The project is also to be discussed within the framework of the Joint Committee of Government and Local Self-Government.

Draft Regulation of the Minister of Climate and Environment on the provision of State aid for the development of hydrogen technologies and associated infrastructure within the framework of the National Recovery and Resilience Plan (934 RCL)²³⁴, updated: 7.04.2023. The aim is to provide financial assistance to hydrogen technologies.

Draft Regulation of the Minister of Agriculture and Rural Development on the detailed conditions and detailed procedure for granting and paying financial assistance under animal welfare schemes within the framework of the Strategic Plan for the Common Agricultural Policy 2023-2027 (503 RCL)²³⁵ updated: 17.03.2023.

Draft Regulation of the Minister of Funds and Regional Policy on granting aid to micro, small and medium-sized entrepreneurs for consultancy services and participation in fairs under the

²³⁰ Dz.U. 2003 Nr 96, poz. 873, t.j. Dz.U. z 2022 r. poz. 1327.

²³¹ Examples: https://bip.umww.pl/279---k_122---k_1---k_1---k_1---zawiadomienie-o-przystapieniu-do-konsultacji-w-1-102135807

²³²<https://legislacja.rcl.gov.pl/projekt/12359902>

²³³ <https://legislacja.rcl.gov.pl/projekt/12362201>

²³⁴<https://legislacja.rcl.gov.pl/projekt/12369601>

²³⁵ <https://legislacja.rcl.gov.pl/projekt/12370552>

regional programmes for 2021-2027 (63 RCL)²³⁶ updated: 3.04.2023. State aid for enterprises for development activities.

Draft Regulation of the Minister of Funds and Regional Policy on granting aid to support innovation and process and organisational innovation under the regional programmes for 2021-2027 (60 RCL²³⁷), updated: 3.04.2023. State aid for enterprises for innovation.

Standing

3. Which of the administrative or civil courts are competent to challenge government measures in court for alleged illegal State aid and for asking remedies (including suspension, recovery of aid and damages)? Do the rules differ (and how) between administrative and civil courts?

Both administrative and civil courts can be competent to challenge government measures for alleged illegal State aid and for asking remedies. This will normally depend on the legal path in which the aid was granted. Administrative courts are competent if the aid was granted by means of an administrative decision or other administrative acts such as an administrative order, a resolution of a regulatory body, an act of local authority, a resolution of a constituent body of the local authority which is not an act of local law, and a general administrative act granting a legal right to a public authority. Meanwhile, civil courts are competent if the aid was granted through a contract, where the State acted in its dominium capacity (i.e. as private law subject). Even though there are no official statistics on this, it can be deduced from the types and amount of aid analysed that most aid is provided by contract. This applies to all (or almost all) EU and national development measures. Similarly, most SGEI compensation is provided through this route. By administrative acts, aid is typically provided in the form of exemptions and concessions from taxes, health/social security contributions health/social insurance and other public law debts.

Neither civil nor administrative procedural rules name specific courts which would be competent in State aid proceedings. Jurisdiction is based on the general principles (i.e. in particular the defendant's domicile, the place where the decision was taken or the authority that took it).

The nature of the administrative and civil procedures differ. The civil procedure is contradictory and the burden of proof to challenge the illegal State aid measure is on a claimant. In its judgment the court rules on the merit of the case. The role of the administrative court is different as it is a court reviewing the legality of the administrative authority's action (for example administrative decision). In principle, the judgment is not on merits as the administration is not entitled to change the administrative decision: in case of a finding of illegality, the administrative court annuls the administrative decision and sends the case back to the administrative authority which issued it. However, the administrative authority is bound by the administrative court's assessment of the case. Therefore, for example the administrative court finding that a given state measure is an illegal State aid will be binding for the administrative authority.

²³⁶ <https://legislacja.rcl.gov.pl/projekt/12369757>

²³⁷ <https://legislacja.rcl.gov.pl/projekt/12369755>

4. Have national courts recognised standing of parties whose competitive position is not affected by the grant of illegal aid? Please reply with “yes”, “no” or “unclear”. If the reply is “yes”, please also specify whether the national courts applied the EU General Court ruling in *Streekgewest Westelijk Noord-Brabant v Staatssecretaris van Financien* (C-174/02, paragraph 19) – or have developed their own jurisprudence.

No, neither civil nor administrative Polish courts so far recognised the standing of parties whose competitive position was not affected by the grant of illegal aid.

However, both administrative and civil courts in Poland properly recognize the direct effect of Art. 108 (3) TFEU and courts' competence in the enforcement of State aid law. Relevant references have primarily been made in cases involving disputes between the State aid grantors and recipients. Cases in which an entity other than a State aid recipient or potential recipient has brought a claim based on Article 108 (3) TFEU are very rare and are limited to claims by competitors of aid recipients or alleged aid recipients. There are no cases in which another type of entity such as an NGO, much less an environmental NGO, has brought a claim. Polish case law in the area of private enforcement is only just developing and is definitely not yet developed enough to make binding conclusions on how claims under Art. 108(3) TFEU are actually reviewed by the courts.

In a number of cases, in which a State aid recipient or potential recipient was a claimant, the court referred to the rights of individuals under Article 108 (3) TFEU. They refrained however from being specific about the entities to which these rights are addressed. Rather, they have used general terms such as "individuals" or "entities" with "a legal interest in invoking before national judicial authorities the direct effect of the ban on aid"²³⁸, "interested parties" and "entitled persons."²³⁹ Moreover, based on an in-depth analysis of the case law of Polish courts covering all state-aid potentially relevant Polish case-law (228 judgements of administrative courts and 650 judgements of civil courts), it can be said with a high degree of probability that Polish courts have issued only one judgment on the merits, in a case in which the plaintiff was a competitor of an alleged aid beneficiary making a claim based on Article 108(3) TFEU. In this judgment of 27.02.2019 (II GSK 313/17), the Supreme Administrative Court (hereinafter referred to as the SAC) reviewed the cassation appeal against the judgment of the Voivodship Administrative Court (hereinafter referred to as VAC) in Warsaw upholding the decision of the Minister of Environment to grant the concession for exploration and prospecting of salt deposits to KGHM Polska Miedź S.A. Its competitor - Darley Energy Poland Sp. z o.o. claimed in the first instance that the decision of the Minister of the Environment to grant KGHM Polska Miedź S.A. this concession violated several provisions of national law as well as Art. 18 and 49 TFEU. Following the dismissal of the claim, the claimant filed a cassation appeal raising, among many other claims, also the one alleging a violation of "Article 107(1) in conjunction with Article 108(3) TFEU through their misinterpretation and misapplication, and consequently maintaining the concession granted to KGHM in force, despite the fact that the granting of the concession to

²³⁸ See for instance judgments of the VACs; in Cracow of 8.12.2022, I SA/Kr 969/22, in Cracow of 8.12.2022, I SA/Kr 970/22; in Cracow of 8.12.2022, I SA/Kr 971/22; in Cracow of 8.12.2022, I SA/Kr 972/22

²³⁹ See judgments of the VACs: in Gliwice of 31.01.2023, I SA/GI 1358/22 and in Gdańsk of 9.08.2022, I SA/Gd 470/22

KGHM constituted State aid incompatible with the internal market, granted without obtaining prior approval from the European Commission."

In this case, however, the SAC did not analyze the issue of the direct effect of Art. 108 (3) TFEU (it also did not assess the standing of the competitor of an alleged aid beneficiary) but instead immediately held that the granting of the concession to KGHM did not constitute State aid. In this regard, it relied on the decision of the European Commission in the same case initiated on the complaint of Darley Energy Poland Sp. z o. o. In this decision, the Commission recognised that the granting of the concession in question to KGHM Polska Miedź S.A. did not meet all the conditions of Art. 107 (1) TFEU. The judgment is thus of limited practical significance for determining the manner of application of Art. 108 (3) TFEU by Polish courts, especially since before the court of first instance a plea based on this provision was not invoked.

In another case, pending however not before an administrative but a civil court, i.e. before the District Court of Warsaw, a plaintiff based his request for injunction to prohibit the parties to a settlement agreement from enforcing its provisions on the argument of the possible violation of Art. 108 (3) TFEU.²⁴⁰ According to the plaintiff, the enforcement of the provisions of the settlement agreement would result in granting of illegal State aid to his competitors. The legal interest of the plaintiff in granting the injunction was thus based on the need to prevent the possible consequences of granting State aid in violation of Article 108 (3) TFEU, which would enable the elimination of distortion of competition in the sphere in which the applicant had an interest. The Court decided to grant the injunction thus accepting the arguments of the plaintiff. It did not, however, refer to the issue of standing in detail (in this case, the claimant was a competitor), nor to the question of the range of individuals entitled to invoke Art. 108 (3) TFEU before the national courts. The judgment on the merits in this case has not been issued which may suggest that the action was withdrawn.

While other examples from the case-law involving a competitor of a State aid beneficiary are missing, several important trends can be observed. First, in many cases, Polish courts expressly recognised the direct effect of the last sentence of Art. 108 (3) TFEU. There are numerous examples of judgments in which administrative courts referred to the allocation of competences between national courts and the European Commission in the area of State aid enforcement. Often, such references have been made in judgments concerning complaints against decisions of tax authorities refusing to grant tax exemptions or allowances due to the lack of prior notification to the Commission of national legislation establishing the tax exemption in question.

One example is a series of rulings in cases concerning the exemption from property tax on rail infrastructure. In these cases, administrative courts usually overturned rulings by Local Government Appeals Boards (Samorządowe Kolegia Odwoławcze) upholding decisions of tax authorities refusing the tax exemption due to the failure to observe the notification requirement pursuant to Art. 108 (3) TFEU. Underlying the rulings of the administrative courts was the view that a national court may apply Article 108 (3) TFEU directly only to protect the rights of individuals invoking its direct effect. However, such a situation did not arise in these cases,

²⁴⁰ Resolution of the District Court of Warsaw of 18.02.2014, II Co 8/14

since the direct effect of this provision was here taken into account by tax authorities and Local Government Appeals Boards *ex officio*.²⁴¹

All these rulings, however, contain an extensive interpretation of the State aid law enforcement framework including the direct effect of the last sentence of Art. 108 (3) TFEU, the division between private and public enforcement, and the division of competences between the Commission and national courts in this area.

In all of them the rights of individuals to invoke the rights resulting from this provision before the national courts have been expressly recognised. For example, in the judgment of 31.01.2023 (I SA/GI 1358/22), the Voivodship Administrative Court of Gdańsk underlined, referring to the CJEU ruling in Case C-174/02 Streekgewest, that "national judicial authorities have an obligation to protect the rights of entities, in case of violations by national authorities of the prohibition on implementing aid without prior Commission approval." It also pointed out that "the purpose of the provision of Article 108(3) TFEU and its direct application is to protect an individual who claims that EU law has been violated by granting of unauthorised State aid to another entity." Subsequently, the Court held that "Article 108 of the TFEU contains, as a rule, regulations addressed to the Member States, which unequivocally normalize issues related to the defectiveness of State aid granted by the Member States."²⁴²

Second, the question of the competence of national courts to apply Article 108 (3) TFEU was addressed by courts. For example, this was a case of several judgments concerning complaints against decisions to deny workplace protection benefits countering the negative economic effects of the COVID-19 pandemic issued by the Voivodship Administrative Court (hereinafter referred to as VAC) in Wrocław. Referring to the CJEU's judgment in the joined cases C-352/14 and C-353/14 Iglesias Gutiérrez and Elisabet Rion Bea v. Bankia SA and others,²⁴³ the VAC stressed that national courts "are vigilant in protecting the rights of individuals in the face of a possible violation by State authorities of the prohibition contained in Article 108 (3) TFEU on implementing a State aid scheme before the Commission has ruled on its compatibility." Similarly, in the judgment of 16.10.2014, I SA/Wr 1601/14, the VAC in Wrocław, which, referring to recital 29 of the 2009 Commission's Communication on the Enforcement of State Aid Law by National Courts²⁴⁴, stressed that their task is also to prevent

²⁴¹ Judgments of the VACs: in Gliwice of 23.01.2023, I SA/GI 1247/22; in Opole of 30.09.2022, I SA/Op 213/22, in Gliwice of 31.01.2023, I SA/GI 1358/22, in Gdańsk of 9.08.2022, I SA/Gd 470/22; in Gdańsk of 9.08.2022, I SA/Gd 471/22, in Gdańsk of 9.08.2022 r., I SA/Gd 472/22; in Gdańsk of 9.08.2022, I SA/Gd 473/22; in Cracow of 8.12.2022, I SA/Kr 969/22, in Cracow of 8.12.2022, I SA/Kr 970/22; in Cracow of 8.12.2022, I SA/Kr 971/22; in Cracow of 8.12.2022, I SA/Kr 972/22

²⁴² Similarly judgements of the VACs: in Opole of 30.09.2022, I SA/Op 213/22; in Cracow of 8.12.2022, I SA/Kr 969/22; of Cracow of 8.12.2022, I SA/Kr 970/22; in Cracow of 8.12.2022, I SA/Kr 971/22; in Cracow of 8.12.2022, I SA/Kr 972/22

²⁴³ EU:C:2015:691

²⁴⁴ OJ C 85, 9.4.2009, p. 1–22

the granting of illegal aid, and therefore to intervene in a situation where the aid has not yet been granted.²⁴⁵

Finally, in the judgment of 31.01.2023 (of I SA/GI 1358/22) the VAC in Gliwice, referring to the Commission's notice on the enforcement of State aid law by national courts, underlined that from its content results, in particular, "a tendency to strengthen this role and encourage the use of private enforcement, especially by competitors of aid recipients."²⁴⁶ In a judgment of 30.09.2022, (I SA/Op 213/22), the VAC in Opole ruled that the direct effect of Article 108 (3) TFEU applies to "proceedings in cases in which judicial protection is sought by a specific entity, such as competitors of an entity that has been granted or is seeking to obtain unlawful State aid." At the same time, the Court refused to apply Art. 108 (3) TFEU, since "in the case at hand there was no entity claiming the direct effect of the prohibition of aid under Article 108 (3) TFEU (...). Neither the complainant nor any entity that could be considered to be in competition with the complainant made claims related to the consequences of the court's failure to comply with the notification obligation."

Third, there are much less judgments of civil courts in which the question of the direct effect of Art. 108 (3) TFEU and the private enforcement of State aid law was considered. Still, civil courts recognise such an effect. One example is the ruling of the Appellate Court in Warsaw of 4.12.2014 (I ACa 1497/14). In this case, a private transport company filed a claim before the court of first instance, against the City of Warsaw for damages. The plaintiff alleged that the City violated Article 416 of the Civil Code²⁴⁷ by illegally entrusting a municipal transport company with the operation of local public transport services. The plaintiff claimed *inter alia* that compensation offered to its competitor by the City of Warsaw was excessive and thus not compatible with the fourth condition of the test established by the CJEU in case C-280/00 *Altmark Trans*²⁴⁸. Therefore the compensation should be considered illegal State aid.

The Appellate Court of Warsaw rejected the complaint. First the Court recalled the general State aid law enforcement framework: "national courts are called upon to guarantee the resulting individual rights with respect to Article 108(3) TFEU". However, as both case law and doctrine make clear - the division of powers between national courts and the Commission is clear. "The Commission and national courts have distinct but complementary roles to play in the field of State aid. The special procedure provided for by Article 108 TFEU is designed to ensure a constant examination of State aid by the Commission, which must take into account complex economic factors undergoing rapid change. The Commission has exclusive competence to assess the compatibility of aid with internal market rules. Therefore, interested parties cannot challenge the compatibility of the aid or the measures financing it before a

²⁴⁵ Similarly judgments of the VAC in Wrocław: of 12.12.2017, I SA/Wr 921/17; of 12.12.2017, I SA/Wr 922/17; of 16.11.2017, I SA/Wr 765/17; of 16.11.2017, I SA/Wr 766/17; of 16.11.2017, I SA/Wr 561/17; of 16.11.2017, I SA/Wr 562/17; of 16.11.2017, I SA/Wr 560/17; of 16.11.2017, I SA/Wr 767/17

²⁴⁶ Similarly judgments of the VACs: in Opole of 30.09.2022 r., I SA/Op 213/22; in Cracow of 8.12.2022, I SA/Kr 969/22; in Cracow of 8.12.2022, I SA/Kr 970/22; in Cracow of 8.12.2022, I SA/Kr 971/22; of Cracow of 8.12.2022, I SA/Kr 972/22

²⁴⁷ Art. 416 of the Civil Code concerns the fault of authority. Pursuant to it, "a legal person is obliged to remedy any damage caused through a fault on the part of its authority."

²⁴⁸ EU:C:2003:415

national court, but they can demand that the court draw consequences for failure to comply with the notification obligation.”²⁴⁹

Next, the court reasoned that failure to comply with the Altmark test leads to the classification of a compensation as State aid but does not prejudice its incompatibility. Indeed, such compensation may still be compatible with the Internal Market according to the relevant EU regulations establishing criteria for the compatibility of State aid in the form of public services compensation. However, as the court rightly held, the assessment of the compatibility of aid with the Internal Market is an exclusive task of the Commission and not the national courts.

5. If the answer to question 4 is “yes”, do environmental NGOs have standing before national administrative bodies(if any) or courts competent in State aid matters to challenge government measures for alleged illegal State aid? Please reply with “yes”, “no” or “unclear”.

Unclear.

Comment: In the current state of case-law, it is impossible to claim with absolute certainty that environmental NGOs (as well as any other NGOs) have standing before national administrative bodies or courts competent in State aid matters to challenge government measures for alleged illegal State aid.

There have been no State aid cases in which the courts or administrative authorities had to deal with the issue of standing of such entities.

However, the case-law discussed above which recognizes the direct effect of Art. 108(3) TFEU and acknowledges the importance of private enforcement. Importantly, both administrative and civil courts referred to the Commission Notice and rights of the parties resulting from Art. 108 (3) TFEU in numerous judgments. Admittedly, none of them concerned rights of NGOs but Polish courts (administrative in particular) are familiar with private enforcement. Taking into account the procedural rules of administrative proceedings in Poland, this gives a reason to believe that an (environmental) NGO would be considered (by the administrative authority or administrative court) to have a standing to join the proceedings concerning granting of State aid to certain entity if procedural requirements for the NGO to act provided in Polish law are met (such as those prescribed in Article 31 of the Code of Administrative Procedure; see also reply to Question 6.).

6. If the answer to question 5 is “yes”, which criteria do NGOs need to fulfil to be granted standing (some examples of criteria may include registration /accreditation with a specific body; number of members; certain period of existence; requirements as to its statutory purpose or form of incorporation; relationship between its activities and the aid challenged etc.)? Are the criteria different for foreign NGOs (i.e. not registered in the country where the aid is challenged)?

Unclear as we have not identified any relevant case-law.

Comment: Generally, in order to be granted standing NGOs need to fulfil one main formal criterion, i.e. be registered in the National Court Register (see Article 8 of the Law on

²⁴⁹ See as well B. Kurcz, Commentary to Article 108 TFEU, in Treaty on the Functioning of the European Union, Commentary, ed. K. Kowalik-Bańczyk and M. Szwarc-Kuczer, WKP 2012, cited by the Court

Associations, Article 9 of the Law on Foundations). In administrative proceedings, NGOs may initiate or join the proceedings in a case of another person if it is justified by the statutory objectives of the organisation and where the public interest so warrants (see Article 31 of the Code of Administrative Proceedings). Under Article 31 of the Code of Administrative Proceedings standing is not dependent on the NGO own legal interest in the proceedings (B. Adamiak, Commentary to Article 31, Legalis 2022). Moreover, the NGOs within the scope of its statutory activity, may participate in administrative court proceedings (see Article 9 of the Law on Administrative Court Proceedings).

In administrative court proceedings, NGOs have standing in administrative court proceedings (see Article 26 of the Law on Administrative Court Proceedings) as they are entitled to lodge a complaint to the VAC (the Administrative Court of the I instance) if they have a legal interest or in matters concerning the legal interests of other persons and if they have participated in the administrative proceedings (Article 50 of the Law on Administrative Court Proceedings). Moreover, an NGO may join the judicial administrative proceedings as a participant if the outcome of the judicial-administrative proceedings concerns the legal interest of other persons and the matter concerns the scope of the social organisation's statutory activity (Article 33(2) of the Law on Administrative Court Proceedings in fine).

In civil proceedings, NGOs whose statutory tasks do not consist of conducting business activity, may, for the protection of citizens' rights, in cases provided for by law, institute proceedings and participate in pending proceedings (see Article 8 of the Code of Civil Proceedings). Specifically, NGOs within the scope of their statutory tasks, may, with the consent of an individual expressed in writing, bring actions on their behalf in cases for alimony, protection of the environment, protection of consumers, protection of industrial property rights, protection of equality and non-discrimination by unjustified direct or indirect differentiation of citizens' rights and obligations (see Article 61 of the Code of Civil Proceedings).

7. Has an NGO with an environmental object previously brought an action against a State aid measure or scheme in the Member State and been recognised by the courts as being entitled to do so? Please reply with “yes” or “no”. If the answer is “yes”, please also detail the context and the outcome of the judgement(s) concerned(admissibility and merits of the action).

No.

8. Have national courts already relied on/ referred to point 27 of the revised Commission's Notice on the enforcement of State aid law by national courts recommending to grant standing to NGOs? Please reply, to the best of your knowledge, with “yes” or “no”. If yes, please also provide a short summary as well as a reference to where the relevant judgement can be accessed.

No, in numerous cases Polish courts, mainly administrative, referred to the 2009 Commission's Notice on the enforcement of State aid law by national courts. There are only 6 judgments delivered after the date of the entry into force of the new Notice, in which the courts referred to its content.²⁵⁰ All these mentions, however, are very short and do not contain references to

²⁵⁰ Judgements of the VAC: in Gliwice of 31.01.2023, I SA/GI 1358/22; in Cracow of 8.12.2022, I SA/Kr 969/22; in Cracow of 8.12.2022, I SA/Kr 970/22; in Cracow of 8.12.2022, I SA/Kr 971/22; in Cracow of 8.12.2022, I SA/Kr 972/22; in Opole of 30.09.2022 I SA/Op 213/22.

specific paragraphs of the Notice or to the question of standing in State aid private enforcement cases. Examples of such references were already presented in the answer to question 4. In one of the recent judgments the VAC in Gliwice, held that from the Commission's notice on the enforcement of State aid law by national courts results, in particular, "a tendency to strengthen this role and encourage the use of private enforcement, especially by competitors of aid recipients."²⁵¹

Available grounds

9. Can a claimant (any category) raise claims related to violations of EU or national environmental law by an aid measure or an activity in support of an action aiming at challenging the grant of aid? Please reply with “yes”, “ no ”or “no data”.

No data.

10. Are there examples of cases where such claims were raised (if so please detail the context and outcome)?

No.

11. More generally, are there instances of claimants (any category) alleging, in support of an action challenging an aid measure or scheme, that a State aid measure or activity breached EU or national law that is not directly State aid law (other than environmental law, which is covered by question 9 above, such as law on public procurements, planning law, tax law etc.)? Please detail the context and the outcome (competence of the courts, merits of the claim and potential test applied by the court, potential reference for preliminary ruling to the CJEU under Article 267 TFEU)?

Yes, in two cases in which competitors were challenging an aid measure or scheme the claim alleging a violation of State aid law was raised. However, when compared with other allegations made, such a claim was of secondary importance to them.

In the appellate case II GSK 313/17 cited above (see Question 4), concerning the validity of a concession decision, the claimant raised the claims alleging violations of many other provisions of Polish and EU law including:

- a. provisions of the Law on Freedom of Economic Activity²⁵² and the Geological and Mining Law²⁵³ establishing the obligation to publish a notice of the possibility of granting only one concession in a case and the obligation to organize a tender for the granting of a concession (see Art. 51(1) in conjunction with Articles 52(1), 53(1)-(6) and 54(1)-(4) of the Law on Freedom of Economic Activity and Article 14(1) the Geological and Mining Law),

²⁵¹ Judgment of the VAC in Gliwice of 31.01.2023 (of I SA/GI 1358/22). Similarly judgments of the VACs: in Opole of 30.09.2022 r., I SA/Op 213/22; in Cracow of 8.12.2022, I SA/Kr 969/22; in Cracow of 8.12.2022, I SA/Kr 970/22; in Cracow of 8.12.2022, I SA/Kr 971/22; of Cracow of 8.12.2022, I SA/Kr 972/22

²⁵² Law of 2.07.2004 on Freedom of Economic Activity, Journal of Laws of 2004, No. 173, item 1807 as amended (repealed)

²⁵³ Law of 9.06.2011, Journal of Laws of 2011, No. 163, item 981 as amended

- b. Art. 29 (1) of the Geological and Mining Law regarding the conditions for refusal to grant a license (alleging that the authority incorrectly applied them resulting in the refusal to grant a concession to the plaintiff),
- c. numerous provisions of the Code of Administrative Procedure²⁵⁴ and other provisions of Geological and Mining Law and the Law on Freedom of Economic Activity, all concerning the criteria to be taken into account when granting concessions, including the use of criteria not provided for by law (Art. 56 (1) (1) and (4) of the Law on Freedom of Economic Activity, Article 25 (1) and (2) of Geological and Mining Law and Art. 7 of the Code of Administrative Procedure,
- d. the provisions of the Code of Administrative concerning the principles of the administrative procedures including the rule of law principles, the principle of deepening trust of citizens to public authorities, the principle the principle of due and comprehensive information of the parties about the factual and legal circumstances,,
- e. Art. 32 (1) of the Constitution of the Republic of Poland regulating the principle of equality before the law
- f. Treaty provisions on non-discrimination (Article 18 TFEU) and freedom of establishment (Article 49 TFEU) by favoring the competitor,
- g. the Agreement between the Government of the Polish People's Republic and the Government of the United Kingdom of Great Britain and Northern Ireland on the Promotion and Reciprocal Protection of Investments, signed in London on December 8, 1987²⁵⁵ and the Agreement between the Republic of Poland and the Republic of Cyprus on the Promotion and Reciprocal Protection of Investments, drawn up in Warsaw on June 4, 1992²⁵⁶, by favoring the competitor.

In another of the cases in which the competitor filed a claim based on the allegation of illegal aid, i.e. in the case I ACa 1497/14 presented above, concerning the alleged incompatibility of the compensation for the performance of public transport services, paid by the City of Warsaw the plaintiff raised a claim alleging the abuse of dominant position in violation of Articles 102 and 106 (1) TFEU and Article 9 of the Act on the protection of competition and consumers.²⁵⁷ It should be recalled that the plaintiff's claim for damages in this case was based on Article 416 of the Civil Code and that all the claims were dismissed.

12. Have there been any instances in the Member States of a national court referring the validity of a Commission's State aid decision to the CJEU under Article 267 TFEU between 1 January 2019 and 31 December 2022?

No, there were no such instances. So far Polish courts referred to the CJEU for a preliminary ruling in State aid matters only twice. None of the cases, however, concerned the question of

²⁵⁴ Law of 14.06.1960, Journal of Laws of 1960, No. 30, item 168 as amended

²⁵⁵ Journal of Laws of 1988, No. 12, item 93, repealed

²⁵⁶ Journal of Laws of 1993, No. 117, item 521, repealed

²⁵⁷ Law of 16.02.2007 on Competition and Consumer Protection, Journal of Laws of 2007, No. 50, item 331 as amended

the validity of a Commission's decision and in both of them, the requests were submitted before 2019.

In the first case, C-574/14 PGE Górnictwo i Energetyka Konwencjonalna S.A. v Prezes Urzędu Regulacji Energetyki (EU:C:2016:686), the Court answered questions about the competence of a national court to assess the compatibility of an approved aid scheme with the Stranded Costs Methodology and about the interpretation of certain provisions of this Methodology.

In the second of these cases (C-329/15 ENEA S.A. v Prezes Urzędu Regulacji Energetyki, EU:C:2017:671), the Court answered a question concerning the classification of the obligation to purchase electricity produced by cogeneration, as provided in Polish law, as State aid.

Procedural costs risks

13. If the answer to question 5 is “yes”, what are the procedural costs and potential adverse costs to be incurred by an NGO for bringing a State aid-related action before a national court, both in case the challenge is ultimately successful and if it unsuccessful?

The answer to question 5 is no, but we provide general overview of the costs.

If a case is brought before a civil court, the party disputing the fact that State aid has been granted must expect the following costs, which it must pay in advance:

- a. a fee for a lawsuit, depending on the value of the subject matter of the dispute in a given case - in the amount specified by the Act of 28 July 2005 on court costs in civil cases;
- b. a fee on a possible appeal, depending on the value of the subject matter of the dispute in a given case - in the amount specified by the Act of 28 July 2005 on court costs in civil cases;
- c. a fee on a possible cassation complaint to the Supreme Court, depending on the value of the subject matter of the dispute in a given case - in the amount specified by the Act of 28 July 2005 on court costs in civil cases;
- d. remuneration of a lawyer representing the claimant in court - in the amount specified in the contract between the claimant and the lawyer;
- e. the cost of stamp duty on the power of attorney - in the amount of PLN 17;
- f. fees for possible complaints against decisions, depending on the value of the subject matter of the dispute in a given case - in the amount specified by the Act of 28 July 2005 on court costs in civil cases;
- g. costs of advance payments for possible opinions of court experts, should there be a need to appoint them.

If the case is won, the costs incurred shall be awarded from the defendant to the claimant:

- a. the application fee;
- b. the appeal fee - if the plaintiff was successful at the appeal stage;

- c. the cassation appeal fee - if the plaintiff has brought a successful cassation appeal and subsequently won the case;
- d. costs of legal representation - in a lump sum, depending on the value of the subject matter of the dispute.²⁵⁸

If the case is lost, the plaintiff does not receive any reimbursement of the costs awarded by the court, so the plaintiff is left with the costs incurred to date and must reimburse the defendant:

- a. the appeal fee - if the defendant won the case at the appeal stage;
- b. the cassation appeal fee - if the defendant brought a successful cassation appeal and subsequently won the case;
- c. costs of legal representation - in a lump sum, depending on the value of the subject matter of the dispute - specified in the Regulation of the Minister of Justice of 22 October 2015 on fees for legal counsels' activities or in the Regulation of the Minister of Justice of 22 October 2015 on fees for legal counsels' activities.

The costs of legal representation are awarded by the court only if the winning party appoints an attorney in the person of an advocate or legal adviser - except that the participation of professional attorneys in this type of intricate legal disputes can be considered practically certain.

If a case is brought before an administrative court, the party challenging the fact that State aid has been granted must expect the following costs, which it must pay in advance:

- a. the fee for the complaint - in the amount specified in the Regulation of the Council of Ministers of 16 December 2003 on the amount and detailed rules for collecting the entry fee in proceedings before administrative courts;
- b. a fee for a possible cassation complaint to the Supreme Administrative Court (in administrative court proceedings, a cassation complaint is an ordinary means of appeal) in the amount specified in the Regulation of the Council of Ministers of 16 December 2003 on the amount and detailed rules for collecting entry fees in proceedings before administrative courts;
- c. remuneration of a lawyer representing the applicant in court - in the amount specified in the agreement between the applicant and the lawyer;
- d. the cost of stamp duty on the power of attorney - in the amount of PLN 17;
- e. fees for possible complaints against decisions - in the amount specified in the Regulation of the Council of Ministers of 16 December 2003 on the amount and detailed rules for collecting entry fees in proceedings before administrative courts.

²⁵⁸ Set out in the Ordinance of the Minister of Justice of 22 October 2015 on fees for legal counsels' activities or the Ordinance of the Minister of Justice of 22 October 2015 on fees for legal counsels' activities, with the proviso that the rates set out in the above-mentioned Ordinances do not correspond to market conditions. Ordinances are not in line with market conditions and considering the fact that, in the Polish reality, in the event of a win, the paid legal representation costs customarily accrue to the winning party's attorney and not to the party itself - although a different provision may be stipulated in the plaintiff's contract with the lawyer, provided both parties agree to it

If the case is successful, the following costs incurred shall be awarded against the opposing party in favour of the applicant:

- a. the application fee;
- b. the cassation fee - in the event of success at second instance;
- c. the costs of legal representation - at a flat rate, depending on the value of the subject matter of the dispute.²⁵⁹

If the plaintiff loses the case, the plaintiff does not receive any reimbursement of the costs awarded by the court, so the plaintiff remains with the costs incurred so far, and does not have to bear any costs of the opposing party, unless these costs have arisen as a result of the successful filing of a cassation appeal by the opposing party, in which case the Supreme Administrative Court shall award the following costs to the plaintiff:

- a. the cassation appeal fee;
- b. the costs of legal representation for the proceedings before the Supreme Administrative Court - in a lump sum, depending on the value of the subject matter of the dispute - as set out in the Regulation of the Minister of Justice of 22 October 2015 on fees for lawyers' activities or the Regulation of the Minister of Justice of 22 October 2015 on fees for legal counsels' activities.

The costs of legal representation are awarded by the court only if the winning party appoints an attorney in the person of an advocate or legal adviser - except that the participation of professional attorneys in this type of complex legal disputes can be considered practically certain.

In summary, despite the range of different costs and different procedures that can be applied, the costs in administrative proceedings can be considered marginal. It can be assumed that they will close in the amount of EUR 1k. This differs in civil proceedings, where the key costs in a dispute over, say, €1m or €10m are as follows.

Amount of the lawsuit (amount of State aid in question)	EUR 1 million		EUR 10 million	
	I instance	II instance	I instance	II instance
Court fee for the claim	PLN 200 000 (maximum fee)	PLN 200 000 (maximum fee)	PLN 200 000 (maximum fee)	PLN 200 000 (maximum fee)

²⁵⁹ Set out in the Regulation of the Minister of Justice of 22 October 2015 on fees for legal counsels' activities or the Regulation of the Minister of Justice of 22 October 2015 on fees for legal counsels' activities, with the proviso that the rates set out in the above-mentioned regulations ordinances do not correspond to market conditions and taking into account the fact that, in the Polish reality, in the event of a victory, the paid costs of legal representation customarily accrue to the attorney of the winning party, and not to the party itself - although a different provision may be stipulated in the plaintiff's contract with the lawyer, if both parties agree to it.

Cost of expert opinion	PLN 10 000 – 15 000	-	PLN 10 000 – 15 000	-
The cost of the opposing party's legal representation if the case is lost.	PLN 15 000	In the event of losing, the costs of legal representation: PLN 11 250 or PLN 15 000 ²⁶⁰	PLN 25 000	In the event of losing, the costs of legal representation: PLN 18 750 or PLN 25 000 ²⁶¹

Remedies

14. In case the reply to questions 4 and/or 5 is yes, what remedies are available to non-competitor applicants before an administrative body (if any) or a court in case of breach of environmental law by an aid measure or by the activity?

Although the answer to questions 4 and 5 is no, we approximate the possible directions of action below.

The national legislation does not directly specify the procedure by NGOs for the recovery of State aid that violates the environmental law by NGOs, in particular such solutions are not contained in the Act of 30 April 2004 *on proceedings in public aid cases*²⁶², which in fact specifies only the procedure for the recovery of aid based on a final decision of the European Commission. Existing case law does not give much guidance on remedies that an NGO could request before a court in State aid private enforcement cases. Some of the few examples of rulings in which the court has commented on the subject are judgments concerning tax exemptions for undertakings operating in special economic zones. In these cases administrative courts have emphasised the role of national courts in enforcing State aid law by pointing to the remedies they can apply and extensively quoting CJEU case law. In the judgment of March 16, 2017, I SA/Wr 1455/16, the VAC in Wrocław held that "national courts are therefore obliged to ensure that any consequences are drawn from a violation of Article 93(3) of the EEC Treaty (Article 88(3) of the TEC; Article 108(3) of the TFEU) in accordance with national law, both with regard to the validity of implementing acts for aid measures and with regard to the repayment of financial support granted in violation of this provision."²⁶³ In

²⁶⁰ Depending on whether the same attorney acted on the opposing side in the first instance or not. If the respondent were the appellant and won the appeal, then in addition to the costs from the first instance, the respondent would have to be reimbursed PLN 200,000 of the appeal fee and either PLN 11,250 or PLN 15,000 of the costs of legal representation (depending on whether the same attorney acted for the opposing side in the first instance or not).

²⁶¹ Depending on whether the same attorney acted on the opposing side in the first instance or not. If the respondent were the appellant and won the appeal, then in addition to the costs from the first instance, the respondent would have to be reimbursed PLN 200,000 of the appeal fee and either PLN 18,750 or PLN 25,000 of the costs of legal representation (depending on whether the same attorney acted on the opposing side in the first instance or not).

²⁶³ See the CJEU rulings cited by the Court: C-354/90, *Fédération nationale du commerce extérieur des produits alimentaires and Others v France*, EU:C:1991:440, para. 12; C-39/94 *Syndicat français de l'Express international (SFEI) and others v La Poste and others*, EU:C:1996:285, para. 40; C-261/01 i C-262/01, *van Calster and Cleeren*, EU:C:2003:571, para. 64; C-368/04, *Transalpine Ölleitung in*

these cases, the administrative courts pointed out that the possibility of effectively invoking Article 108 (3) TFEU before a national court does not apply to the beneficiary of the aid. Such a possibility applies "for example, to the aid beneficiary's client, i.e., an entity that could claim the protection of its rights in the context of an inferior competitive position".²⁶⁴

Administrative and judicial-administrative proceedings

In general, NGOs in cases before the administrative court could derive their standing from:

- a. Article 50 § 1 ppsa, deriving a legal interest from Article 108(3) TFEU;
- b. Article 50(2) of the Code of Administrative Procedure, inferring that Article 108(3) TFEU is a special provision entitling an NGO to bring an action;
- c. Article 33 § 2 ppsa, to join pending administrative court proceedings;
- d. Article 52 § 1 ppsa, in a situation where the NGO participated as a party in administrative proceedings and filed a complaint, or from Article 33 § 1 ppsa (as a participant), in cases where the NGO participated in administrative proceedings but did not file a complaint.

In the case of State aid granted by authoritative acts of public administrative authorities, it is most appropriate to bring a complaint before an administrative court either after administrative proceedings or directly.

Pursuant to Article 50 § 1 of the Act of 30 August 2002 *Law on Proceedings before Administrative Courts*²⁶⁵ (hereinafter also "ppsa"), a person entitled to lodge a complaint is anyone who has a legal interest in it, a public prosecutor, an Ombudsman, an Ombudsman for Children, and a social organisation within the scope of its statutory activity, in matters concerning the legal interests of other persons, if it participated in administrative proceedings. In addition, the provision of Article 50 § 2 ppsa also gives the right to file a complaint to another entity, including a social organization within the scope of its statutory activities.²⁶⁶ The provision of Article 33 § 2 ppsa allows a social organisation that has not participated in administrative

Österreich GmbH and Others v Finanzlandesdirektion für Tirol and Others, EU:C:2006:644, para. 47; see as well judgements of the VAC in Wrocław: of 16.03.2017, I SA/Wr 1456/16; of 16.03.2017, I SA/Wr 1448/16; of 16.03.2017, I SA/Wr 1449/16; of 16.03.2017, I SA/Wr 1447/16; of 16.03.2017, I SA/Wr 1458/16; of 16.03.2017, I SA/Wr 1451/16; of 07.03.2017, I SA/Wr 1441/16; of 07.03.2017, I SA/Wr 1442/16; of 07.03.2017, I SA/Wr 1443/16; of 07.03.2017, I SA/Wr 1444/16; of 07.03.2017, I SA/Wr 1439/16; of 07.03.2017, I SA/Wr 1440/16

²⁶⁴ See inter alia judgements of the VAC in Wrocław: of 16.03.2017, I SA/Wr 1456/16; of 16.03.2017, I SA/Wr 1448/16; of 16.03.2017, I SA/Wr 1449/16; of 16.03.2017, I SA/Wr 1447/16; of 16.03.2017, I SA/Wr 1458/16; of 16.03.2017, I SA/Wr 1451/16; of 07.03.2017, I SA/Wr 1441/16; of 07.03.2017, I SA/Wr 1442/16; of 07.03.2017, I SA/Wr 1443/16; of 07.03.2017, I SA/Wr 1444/16; of 07.03.2017, I SA/Wr 1439/16; of 07.03.2017, I SA/Wr 1440/16

²⁶⁵ Ustawa z dnia 30 sierpnia 2002 r. *Prawo o postępowaniu przed sądami administracyjnymi*, Dz.U. 2004 Nr 123, poz. 1291 t.j. Dz.U. z 2021 r. poz. 743

²⁶⁶ "Eligible to file a complaint is anyone who has a legal interest in it, the public prosecutor, the Ombudsman, the Ombudsman for Children, and a social organization within the scope of its statutory activities, in cases involving the legal interests of others, if it participated in the administrative proceedings." (translation)

proceedings to participate in administrative court proceedings if the case concerns the scope of its statutory activity, in matters concerning the legal interests of other persons.

Pursuant to Article 3 § 2 of the Code of Administrative Procedure, the subject of a complaint to the administrative court may be, inter alia: an administrative decision, a decision issued in administrative proceedings which is subject to a complaint or which terminates proceedings, as well as decisions which resolve the matter as to the substance, as well as a number of other acts and actions listed in this provision and of lesser importance for the issue of State aid. This shows that from the formal point of view, the grounds for granting State aid fall within this scope.

In the case where the granting of State aid would take place by way of or in connection with administrative proceedings, the appropriate course of action would be for the NGO to attempt to join the case as a party on the basis of (Article 31 § 1 item 2 of the Code of Administrative Procedure), which stipulates that an NGO may, in a case involving another person, request to be allowed to participate in the proceedings if this is justified by its statutory objectives and if the public interest so justifies. In the case of refusal to allow such an organisation to participate in the proceedings, it may, pursuant to Article 32 § 2 of the Code of Administrative Procedure, challenge the decision on refusal to allow it to participate in the case and then, if the decision is upheld by the body of the second instance, file a complaint to the administrative court (Voivodship Administrative Court). In the case of admission to participate in the proceedings, a social organisation acts in the proceedings with the rights of a party (Article 32 § 2 of the Code of Administrative Procedure) and is therefore entitled to actively participate in the proceedings and to file administrative appeals and then a complaint to the administrative court.

In the absence of a relevant administrative procedure pending to which the NGO could have acceded, the NGO may also apply to the competent authority to initiate such a procedure. There is no established procedure in national legislation on administrative proceedings concerning State aid incompatible with environmental law. Of course, Article 108(3) TFEU is directly applicable in Poland (see case law under Q4), and the EU Treaty provision in question could serve as a legal basis for conducting administrative proceedings to establish that State aid has been granted unlawfully and to order its recovery, although this would certainly encounter numerous practical difficulties related to the lack of broader regulations specifying how such proceedings would proceed and the possible catalogue of decisions.

In the case of State aid granted outside the framework of classic administrative proceedings, which the NGO could join, it could lodge, on the basis of the already Article 3 § 2 point 4 ppsa, a complaint to an administrative court against a sovereign action of a public entity: a material and technical action, a resolution of a decision-making body of a local self-government unit which is not an act of local law or a general administrative act.

In addition, if the basis for the granting of aid was an act of local law, the NGO could lodge an appropriate complaint, depending on the local government unit whose decision-making body issued the act: under Article 101 of the Act of 8 March 1990 on municipal self-government²⁶⁷ ,

²⁶⁷ Ustawa z dnia 8 marca 1990 r. o *samorządzie gminnym* (Dz.U. 1990 Nr 16, poz. 95 t.j. Dz.U. z 2023 r. poz. 40)

under Article 87 of the Act of 5 June 1998 on county self-government²⁶⁸ or under Article 90 of the Act of 5 June 1998 on province self-government²⁶⁹.

Due to the cassation model of administrative courts in Poland, a probable decision of the administrative court, if the complaint is upheld, would be to declare the given decision or action null and void or to overrule it. The Polish administrative court procedure also allows, in certain cases, for issuing a substantive decision on the merits of a case (Article 145a of the Administrative Law Act), so hypothetically, the court could order the return of State aid granted contrary to environmental law or directly oblige the authority to issue such a decision, but in practice, Article 145a of the Administrative Law is a provision that is not used to any extent in practice. Moreover, in the case of acts of local law, the application of Article 145a ppsa is impossible, the court may only issue a cassation decision (Article 147 ppsa). This means that, in practice, the issue of recovery would be decided at the level of public administration bodies - for which, as already mentioned, appropriate national regulations are lacking.

The above considerations also apply to a complaint against the inaction of a public administration body, in a situation in which State aid occurs through the omission of a public entity (Article 3 § 2(8) ppsa).

Environment protection and criminal procedure

Pursuant to Article 323 of the Environmental Law, an environmental organization has independent standing to bring civil claims against those affecting the environment unlawfully:

- a. anyone who is directly threatened or harmed by an unlawful impact on the environment may demand that the entity responsible for the threat or violation restore the lawful condition and take preventive measures, in particular by installing installations or equipment to prevent the threat or violation; if this is impossible or excessively difficult, he may demand that the activity causing the threat or violation be stopped.
- b. if the threat or violation concerns the environment as a common good, the claim referred to in paragraph (1) may be brought by the State Treasury, a local government unit, as well as an environmental organization.

Article 323 of the Environmental Protection Law is about classic protection against poisoning of the environment, no matter what funds are used, and not about issues related to State aid. It seems to be difficult to apply this provision in the context of State aid.

As for criminal liability, the unlawful granting of State aid will constitute a crime of exceeding powers (Article 231 of the Penal Code) and anyone can file a notice. A social organization will even have the right to complain about a possible refusal to initiate or discontinuance. Chapter XXII of the Penal Code, which includes crimes against the environment, covers the issue of poisoning the environment in various ways.

²⁶⁸ Ustawa z dnia 5 czerwca 1998 r. o samorządzie powiatowym (Dz.U. 1998 Nr 91, poz. 578 t.j. Dz.U. z 2022 r. poz. 1526)

²⁶⁹ Ustawa z dnia 5 czerwca 1998 r. o samorządzie województwa (Dz.U. 1998 Nr 91, poz. 576 t.j. Dz.U. z 2022 r. poz. 2094)

Civil law proceedings

In cases where the source of the aid is a civil act (e.g. a contract or a unilateral declaration of intent), it seems that the appropriate course of action would be for the NGO to bring a civil action against the beneficiary of the unlawful aid, e.g. to establish the invalidity of the legal act on which the aid is based and to order its repayment. It seems that the defendant in such cases should also be the provider of the unlawful aid.

While in the case of a competitor of the beneficiary entity proving standing would not be a problem, due to the lack of national regulations on private enforcement in civil proceedings and the lack of developed jurisprudential solutions in this area, initial attempts by NGOs to bring this type of action may result in losing cases due to lack of standing on the part of the NGO.

Both the civil procedure (Article 1991 of the Civil Procedure Code) and the administrative court procedure (Article 58 § 4 of the Civil Procedure Code) contain safeguards that prevent a civil court from rejecting a lawsuit due to lack of cognition in the case of a prior rejection of a complaint by an administrative court due to lack of cognition and vice versa, an administrative court cannot reject a complaint in the case of a prior rejection of a lawsuit by a civil court due to lack of cognition.

Transparency

15. How can third parties find out about possible planned, illegal or incompatible State aid from official sources? Are there national registers? What publicity is given to the granting of aid and to its notification to the EU Commission?

There are two complementary databases on State aid granted in Poland. The first is the UOKiK database on State aid granted in Poland.²⁷⁰ The second is the database of the minister competent for agriculture and fisheries on aid granted in agriculture or fisheries.²⁷¹ Both databases contain information on the legal basis on which the aid was granted, the date on which it was granted, the entity granting it, the value of the aid, its form and purpose. The entity granting State aid in Poland is obliged to enter such aid in one of these databases. Based on these data, both institutions additionally prepare annual collective reports.

Pursuant to the Public Finance Act²⁷², the management board of the local authority shall make public (Public Information Bulletin, BIP) by 31 May of year n+1 for year n:

- a. a list of guarantees and warranties granted, listing the entities to which the guarantees and warranties relate,
- b. a list of legal and natural persons and organisational units without legal personality to whom concessions, deferrals, amortisations or spreads of repayment in instalments of

²⁷⁰ <https://sudop.uokik.gov.pl/home>; Entities providing aid, pursuant to the Act of 30 April 2004 on proceedings in State aid cases (i.e. Journal of Laws of 2021, item 743, as amended), are obliged to submit reports to the President of the Competition and Consumer Protection Office (UOKiK) on the State aid provided or information on the State aid not provided. Pursuant to § 2. section 1. of the Ordinance of the Council of Ministers of 23 December 2019 on the manner of granting access to the SHRIMP application (Journal of Laws of 2019, item 2520), all entities granting aid other than the body of the National Fiscal Administration shall submit reports on aid granted or information on no aid granted using the SHRIMP application.

²⁷¹ <https://srpp.minrol.gov.pl/>

²⁷² Article. 37 ust. 1 pkt. 2 lit g ustawy z dnia 27 sierpnia 2009 r. o finansach publicznych (Dz.U. 2009 Nr 157, poz. 1240, t.j. Dz.U. z 2022 r. poz. 1634)

an amount exceeding PLN 500 have been granted with respect to taxes or fees, together with an indication of the amount amortised and the reasons for amortisation,

- c. list of legal and natural persons and organisational units without legal personality to whom State aid was granted.

The statements contain a limited scope of information, i.e.: a list of legal and natural persons and organisational units without legal personality to which State aid was granted in a given year.²⁷³

UOKIK publishes aid schemes notified to the European Commission²⁷⁴ and European Commission decisions on State aid in Poland.²⁷⁵ Regardless, the media often report on programmes notified to the European Commission and particularly controversial State aid projects.

16. Please provide details of any national legislation that gives third parties access to documents on State aid granted to beneficiaries that are held by national public authorities.

The Act on access to public information²⁷⁶ regulates the rules of access to public information, including access to information on State aid issues. Access shall be provided at the request of the subject (Article 2(1) of the Act). A person wishing to obtain this information cannot be required to demonstrate a legal or factual interest. Among others, public administration bodies, as well as economic entities performing public tasks or disposing of public property, are obliged to make information available.

Under this law, everyone has the right to obtain public information, to consult official documents and to have access to the meetings of collegial bodies of public authorities elected by universal suffrage. Restrictions apply to classified and legally protected information (e.g. business secrets). Documents drawn up by consumers or entrepreneurs and submitted to an administrative authority, in particular notifications, concentration notifications, files of administrative proceedings, complaints and other documents submitted in individual or private matters may not be considered public information. The Act contains examples of issues that may be the basis for access. These concern, among others, the content of administrative acts and other decisions (art. 6 para. 1 pkt. 4(a) of the Act), the content of other speeches and assessments made by public authorities (art. 6 para. 1 pkt. 4(c) of the Act), public assets, including State aid (art. 6 para. 1 pt. 5(g) of the Act). These include issues relating to the provision of State aid, but in practice the knowledge about the State aid decisions is not known to the extent required for external verification, e.g. for the environmental NGOs.

Access to information is free of charge, except when a public administration body, as a result of providing public information, is to incur additional costs related to the manner of providing access specified in the request or the necessity to convert the information into the form specified in the request. They may then charge the applicant a fee corresponding to the

²⁷³ Example: <http://przasnysz.biuletyn.net/?bip=1&cid=1156&bsc=N>;
https://bip.zielonagora.pl/134/1/archiwum/Ulgi_i_pomoc_publiczna/;
https://bip.czeladz.pl/pomoc_publiczna/index.html;

²⁷⁴ https://uokik.gov.pl/Procedury_notyfikacyjne.php#faq3282;

²⁷⁵ https://uokik.gov.pl/informacje_o_decyzjach_komisji_europejskiej.php;

²⁷⁶ Ustawa z dnia 6 września 2001 r. o dostępie do informacji publicznej (Dz.U. 2001 Nr 112, poz. 1198 t.j. Dz.U. z 2022 r. poz. 902)

incurred costs. The information, as requested, shall be made available after 14 days from the date of notification to the applicant, unless, within that period, the applicant changes the request in the manner or form in which the information is made available or withdraws the request.

LIST OF ADMINISTRATIVE COURT JUDGEMENTS UNDER SCRUTINY

1. I SA/GI 1358/22 - Wyrok WSA w Gliwicach z 2023-01-31
2. III SA/Wa 1706/22 - Wyrok WSA w Warszawie z 2023-01-23
3. I SA/GI 1247/22 - Wyrok WSA w Gliwicach z 2023-01-23
4. I SA/Łd 651/22 - Wyrok WSA w Łodzi z 2022-12-20
5. I SA/Łd 652/22 - Wyrok WSA w Łodzi z 2022-12-20
6. I SA/Łd 654/22 - Wyrok WSA w Łodzi z 2022-12-20
7. I SA/Łd 653/22 - Wyrok WSA w Łodzi z 2022-12-20
8. I SA/Kr 969/22 - Wyrok WSA w Krakowie z 2022-12-08
9. I SA/Kr 970/22 - Wyrok WSA w Krakowie z 2022-12-08
10. I SA/Kr 971/22 - Wyrok WSA w Krakowie z 2022-12-08
11. I SA/Kr 972/22 - Wyrok WSA w Krakowie z 2022-12-08
12. III SA/Wr 262/21 - Wyrok WSA we Wrocławiu z 2022-11-25
13. III FSK 1075/21 - Wyrok NSA z 2022-11-08
14. I SA/Kr 811/22 - Wyrok WSA w Krakowie z 2022-10-11
15. I SA/Op 213/22 - Wyrok WSA w Opolu z 2022-09-30
16. I SA/Kr 603/22 - Wyrok WSA w Krakowie z 2022-08-30
17. I SA/Kr 600/22 - Wyrok WSA w Krakowie z 2022-08-30
18. I SA/Kr 601/22 - Wyrok WSA w Krakowie z 2022-08-30
19. I SA/Kr 602/22 - Wyrok WSA w Krakowie z 2022-08-30
20. I SA/Gd 470/22 - Wyrok WSA w Gdańsku z 2022-08-09
21. I SA/Gd 471/22 - Wyrok WSA w Gdańsku z 2022-08-09
22. I SA/Gd 472/22 - Wyrok WSA w Gdańsku z 2022-08-09
23. I SA/Gd 473/22 - Wyrok WSA w Gdańsku z 2022-08-09
24. I SA/Gd 347/22 - Wyrok WSA w Gdańsku z 2022-07-26
25. I SA/Gd 348/22 - Wyrok WSA w Gdańsku z 2022-07-26
26. I SA/Gd 255/22 - Wyrok WSA w Gdańsku z 2022-07-05
27. I SA/Gd 256/22 - Wyrok WSA w Gdańsku z 2022-07-05
28. I SA/Gd 257/22 - Wyrok WSA w Gdańsku z 2022-07-05
29. I SA/Wr 82/22 - Wyrok WSA we Wrocławiu z 2022-06-29
30. I SA/Wr 79/22 - Wyrok WSA we Wrocławiu z 2022-06-29
31. I SA/Wr 80/22 - Wyrok WSA we Wrocławiu z 2022-06-29
32. I SA/Wr 81/22 - Wyrok WSA we Wrocławiu z 2022-06-29
33. III SA/Wr 209/21 - Wyrok WSA we Wrocławiu z 2022-06-22
34. III SA/Wr 210/21 - Wyrok WSA we Wrocławiu z 2022-06-22
35. III SA/Wr 260/21 - Wyrok WSA we Wrocławiu z 2022-06-22
36. I SA/Bd 275/22 - Wyrok WSA w Bydgoszczy z 2022-06-07
37. I SA/Sz 140/22 - Wyrok WSA w Szczecinie z 2022-05-26
38. III FSK 945/21 - Wyrok NSA z 2022-04-27
39. III FSK 946/21 - Wyrok NSA z 2022-04-27
40. I SA/Op 199/21 - Wyrok WSA w Opolu z 2021-12-08
41. III FSK 4332/21 - Wyrok NSA z 2021-11-04
42. I SA/Rz 563/21 - Wyrok WSA w Rzeszowie z 2021-10-19
43. III FSK 221/21 - Wyrok NSA z 2021-10-07
44. III FSK 312/21 - Wyrok NSA z 2021-10-07
45. I SA/Łd 461/21 - Wyrok WSA w Łodzi z 2021-09-28
46. VI SA/Wa 1315/21 - Wyrok WSA w Warszawie z 2021-08-10
47. VI SA/Wa 1316/21 - Wyrok WSA w Warszawie z 2021-08-10
48. VI SA/Wa 1314/21 - Wyrok WSA w Warszawie z 2021-08-10
49. I SA/Op 169/20 - Wyrok WSA w Opolu z 2021-05-20
50. III SA/Po 427/21 - Wyrok WSA w Poznaniu z 2021-05-19
51. III SA/Wa 2030/20 - Wyrok WSA w Warszawie z 2021-05-18
52. III SA/Wa 2029/20 - Wyrok WSA w Warszawie z 2021-05-18
53. III SA/Wa 2021/20 - Wyrok WSA w Warszawie z 2021-04-28
54. III SA/Wa 2022/20 - Wyrok WSA w Warszawie z 2021-04-28
55. III SA/Wa 2023/20 - Wyrok WSA w Warszawie z 2021-04-28
56. I SA/Op 146/21 - Wyrok WSA w Opolu z 2021-04-23
57. III SA/Wa 2018/20 - Wyrok WSA w Warszawie z 2021-04-22
58. III SA/Wa 2020/20 - Wyrok WSA w Warszawie z 2021-04-22

59. III SA/Wa 2026/20 - Wyrok WSA w Warszawie z 2021-04-22
60. III SA/Wa 2028/20 - Wyrok WSA w Warszawie z 2021-04-22
61. III SA/Wa 2288/20 - Wyrok WSA w Warszawie z 2021-04-22
62. III SA/Wa 2289/20 - Wyrok WSA w Warszawie z 2021-04-22
63. III SA/Wa 2027/20 - Wyrok WSA w Warszawie z 2021-04-22
64. III SA/Wa 2019/20 - Wyrok WSA w Warszawie z 2021-04-22
65. III SA/Wa 2031/20 - Wyrok WSA w Warszawie z 2021-04-22
66. III SA/Wa 2032/20 - Wyrok WSA w Warszawie z 2021-04-22
67. III SA/Wa 2285/20 - Wyrok WSA w Warszawie z 2021-04-22
68. III SA/Wa 2284/20 - Wyrok WSA w Warszawie z 2021-04-22
69. I SA/Po 144/21 - Wyrok WSA w Poznaniu z 2021-03-31
70. I SA/Op 242/20 - Wyrok WSA w Opolu z 2021-01-15
71. II FSK 2042/18 - Wyrok NSA z 2020-12-17
72. I SA/Sz 527/20 - Wyrok WSA w Szczecinie z 2020-11-12
73. I SA/Sz 507/20 - Wyrok WSA w Szczecinie z 2020-11-10
74. I SA/Sz 524/20 - Wyrok WSA w Szczecinie z 2020-10-22
75. I SA/Sz 466/20 - Wyrok WSA w Szczecinie z 2020-10-22
76. I SA/Sz 573/20 - Wyrok WSA w Szczecinie z 2020-10-21
77. I SA/Sz 468/20 - Wyrok WSA w Szczecinie z 2020-10-08
78. II FSK 1531/18 - Wyrok NSA z 2020-10-01
79. II FSK 3795/18 - Wyrok NSA z 2020-09-22
80. V SA/Wa 1774/19 - Wyrok WSA w Warszawie z 2020-09-17
81. II FSK 1294/18 - Wyrok NSA z 2020-09-08
82. II FSK 1291/18 - Wyrok NSA z 2020-09-08
83. II FSK 1292/18 - Wyrok NSA z 2020-09-08
84. II FSK 1425/18 - Wyrok NSA z 2020-09-01
85. II FSK 3137/19 - Wyrok NSA z 2020-08-26
86. I SA/Bd 380/19 - Wyrok WSA w Bydgoszczy z 2019-08-13
87. V SA/Wa 1767/19 - Wyrok WSA w Warszawie z 2020-08-11
88. I SA/Bk 369/20 - Wyrok WSA w Białymstoku z 2020-07-15
89. I SA/Gd 15/20 - Wyrok WSA w Gdańsku z 2020-06-17
90. I GSK 135/20 - Wyrok NSA z 2020-06-17
91. I SA/Bd 687/19 - Wyrok WSA w Bydgoszczy z 2020-02-05
92. II FSK 416/18 - Wyrok NSA z 2020-01-30
93. II FSK 415/18 - Wyrok NSA z 2020-01-30
94. II FSK 335/18 - Wyrok NSA z 2020-01-23
95. V SA/Wa 1531/19 - Wyrok WSA w Warszawie z 2020-01-22
96. V SA/Wa 2254/19 - Wyrok WSA w Warszawie z 2020-01-21
97. II FSK 278/18 - Wyrok NSA z 2020-01-09
98. II FSK 223/18 - Wyrok NSA z 2020-01-09
99. V SA/Wa 1073/19 - Wyrok WSA w Warszawie z 2019-12-18
100. II SA/Go 658/19 - Wyrok WSA w Gorzowie Wlkp. z 2019-12-18
101. II FSK 97/18 - Wyrok NSA z 2019-12-17
102. V SA/Wa 1071/19 - Wyrok WSA w Warszawie z 2019-12-13
103. I SA/Sz 668/19 - Wyrok WSA w Szczecinie z 2019-12-12
104. I GSK 623/19 - Wyrok NSA z 2019-12-11
105. I GSK 686/19 - Wyrok NSA z 2019-12-11
106. I GSK 721/19 - Wyrok NSA z 2019-12-11
107. I GSK 722/19 - Wyrok NSA z 2019-12-11
108. V SA/Wa 996/19 - Wyrok WSA w Warszawie z 2019-12-09
109. II FSK 3945/17 - Wyrok NSA z 2019-11-28
110. V SA/Wa 950/19 - Wyrok WSA w Warszawie z 2019-11-22
111. V SA/Wa 866/19 - Wyrok WSA w Warszawie z 2019-11-22
112. II SA/Go 596/19 - Wyrok WSA w Gorzowie Wlkp. z 2019-11-13
113. II FSK 3600/17 - Wyrok NSA z 2019-10-17
114. II FSK 3775/17 - Wyrok NSA z 2019-10-09
115. II FSK 3291/17 - Wyrok NSA z 2019-10-08
116. V SA/Wa 596/19 - Wyrok WSA w Warszawie z 2019-09-25
117. II FSK 3385/17 - Wyrok NSA z 2019-09-25
118. II FSK 3384/17 - Wyrok NSA z 2019-09-25

119. II FSK 3289/17 - Wyrok NSA z 2019-09-18
120. V SA/Wa 508/19 - Wyrok WSA w Warszawie z 2019-08-30
121. V SA/Wa 349/19 - Wyrok WSA w Warszawie z 2019-08-30
122. III SA/Po 119/19 - Wyrok WSA w Poznaniu z 2019-08-29
123. V SA/Wa 2125/18 - Wyrok WSA w Warszawie z 2019-08-14
124. I SA/Bd 380/19 - Wyrok WSA w Bydgoszczy z 2019-08-13
125. II FSK 3290/17 - Wyrok NSA z 2019-07-16
126. V SA/Wa 376/19 - Wyrok WSA w Warszawie z 2019-07-10
127. I GSK 494/19 - Wyrok NSA z 2019-06-18
128. I GSK 495/19 - Wyrok NSA z 2019-06-18
129. II FNP 5/19 - Wyrok NSA z 2019-05-29
130. II FNP 4/19 - Wyrok NSA z 2019-05-29
131. II FNP 6/19 - Wyrok NSA z 2019-05-29
132. II FNP 3/19 - Wyrok NSA z 2019-05-29
133. V SA/Wa 2082/18 - Wyrok WSA w Warszawie z 2019-05-07
134. V SA/Wa 1540/18 - Wyrok WSA w Warszawie z 2019-03-26
135. II FSK 2962/17 - Wyrok NSA z 2019-03-13
136. V SA/Wa 2004/18 - Wyrok WSA w Warszawie z 2019-03-13
137. V SA/Wa 1900/18 - Wyrok WSA w Warszawie z 2019-03-13
138. V SA/Wa 1879/18 - Wyrok WSA w Warszawie z 2019-03-13
139. V SA/Wa 1814/18 - Wyrok WSA w Warszawie z 2019-03-13
140. II GSK 314/17 - Wyrok NSA z 2019-02-27
141. II GSK 313/17 - Wyrok NSA z 2019-02-27
142. II FSK 1893/17 - Wyrok NSA z 2019-02-05
143. II FSK 1567/18 - Wyrok NSA z 2018-11-30
144. V SA/Wa 1099/18 - Wyrok WSA w Warszawie z 2018-11-15
145. II FSK 2983/17 - Wyrok NSA z 2018-10-22
146. I SA/Wr 523/18 - Wyrok WSA we Wrocławiu z 2018-09-04
147. V SA/Wa 105/18 - Wyrok WSA w Warszawie z 2018-07-25
148. V SA/Wa 106/18 - Wyrok WSA w Warszawie z 2018-07-25
149. V SA/Wa 107/18 - Wyrok WSA w Warszawie z 2018-07-25
150. V SA/Wa 108/18 - Wyrok WSA w Warszawie z 2018-07-25
151. V SA/Wa 103/18 - Wyrok WSA w Warszawie z 2018-07-25
152. V SA/Wa 104/18 - Wyrok WSA w Warszawie z 2018-07-25
153. II GSK 776/18 - Wyrok NSA z 2018-07-06
154. I GSK 1021/18 - Wyrok NSA z 2018-06-12
155. V SA/Wa 644/17 - Wyrok WSA w Warszawie z 2018-05-10
156. III SA/Wa 1076/17 - Wyrok WSA w Warszawie z 2018-04-11
157. V SA/Wa 227/17 - Wyrok WSA w Warszawie z 2018-02-01
158. V SA/Wa 1292/17 - Wyrok WSA w Warszawie z 2018-02-01
159. V SA/Wa 1293/17 - Wyrok WSA w Warszawie z 2018-02-01
160. I SA/Wr 1114/17 - Wyrok WSA we Wrocławiu z 2018-01-30
161. V SA/Wa 255/17 - Wyrok WSA w Warszawie z 2017-12-14
162. I SA/Wr 920/17 - Wyrok WSA we Wrocławiu z 2017-12-12
163. I SA/Wr 923/17 - Wyrok WSA we Wrocławiu z 2017-12-12
164. I SA/Wr 921/17 - Wyrok WSA we Wrocławiu z 2017-12-12
165. I SA/Wr 922/17 - Wyrok WSA we Wrocławiu z 2017-12-12
166. V SA/Wa 41/17 - Wyrok WSA w Warszawie z 2017-12-06
167. V SA/Wa 3185/16 - Wyrok WSA w Warszawie z 2017-11-22
168. I SA/Wr 765/17 - Wyrok WSA we Wrocławiu z 2017-11-16
169. I SA/Wr 766/17 - Wyrok WSA we Wrocławiu z 2017-11-16
170. I SA/Wr 561/17 - Wyrok WSA we Wrocławiu z 2017-11-16
171. I SA/Wr 562/17 - Wyrok WSA we Wrocławiu z 2017-11-16
172. I SA/Wr 560/17 - Wyrok WSA we Wrocławiu z 2017-11-16
173. I SA/Wr 767/17 - Wyrok WSA we Wrocławiu z 2017-11-16
174. V SA/Wa 2936/16 - Wyrok WSA w Warszawie z 2017-11-10
175. I SA/Po 759/17 - Wyrok WSA w Poznaniu z 2017-11-09
176. II FSK 1824/17 - Wyrok NSA z 2017-09-27
177. II FSK 1826/17 - Wyrok NSA z 2017-09-27
178. II FSK 1823/17 - Wyrok NSA z 2017-09-27

179. II FSK 1825/17 - Wyrok NSA z 2017-09-27
180. II FSK 1817/17 - Wyrok NSA z 2017-09-27
181. II FSK 1818/17 - Wyrok NSA z 2017-09-27
182. II FSK 1819/17 - Wyrok NSA z 2017-09-27
183. II FSK 1820/17 - Wyrok NSA z 2017-09-27
184. II FSK 1821/17 - Wyrok NSA z 2017-09-27
185. II FSK 1822/17 - Wyrok NSA z 2017-09-27
186. II FSK 1829/17 - Wyrok NSA z 2017-09-27
187. II FSK 1828/17 - Wyrok NSA z 2017-09-27
188. II FSK 1827/17 - Wyrok NSA z 2017-09-27
189. V SA/Wa 1501/17 - Wyrok WSA w Warszawie z 2017-09-27
190. I SA/Wr 183/17 - Wyrok WSA we Wrocławiu z 2017-07-03
191. I SA/Wr 184/17 - Wyrok WSA we Wrocławiu z 2017-07-03
192. I SA/Wr 182/17 - Wyrok WSA we Wrocławiu z 2017-07-03
193. I SA/Wr 178/17 - Wyrok WSA we Wrocławiu z 2017-07-03
194. I SA/Wr 180/17 - Wyrok WSA we Wrocławiu z 2017-07-03
195. I SA/Wr 179/17 - Wyrok WSA we Wrocławiu z 2017-07-03
196. I SA/Gd 405/17 - Wyrok WSA w Gdańsku z 2017-06-27
197. II GSK 2386/15 - Wyrok NSA z 2017-05-09
198. II FSK 676/15 - Wyrok NSA z 2017-04-06
199. II FSK 675/15 - Wyrok NSA z 2017-04-06
200. II FSK 677/15 - Wyrok NSA z 2017-04-06
201. II FSK 678/15 - Wyrok NSA z 2017-04-06
202. I SA/Wr 1455/16 - Wyrok WSA we Wrocławiu z 2017-03-16
203. I SA/Wr 1456/16 - Wyrok WSA we Wrocławiu z 2017-03-16
204. I SA/Wr 1449/16 - Wyrok WSA we Wrocławiu z 2017-03-16
205. I SA/Wr 1447/16 - Wyrok WSA we Wrocławiu z 2017-03-16
206. I SA/Wr 1448/16 - Wyrok WSA we Wrocławiu z 2017-03-16
207. I SA/Wr 1450/16 - Wyrok WSA we Wrocławiu z 2017-03-16
208. I SA/Wr 1451/16 - Wyrok WSA we Wrocławiu z 2017-03-16
209. I SA/Wr 1441/16 - Wyrok WSA we Wrocławiu z 2017-03-07
210. I SA/Wr 1442/16 - Wyrok WSA we Wrocławiu z 2017-03-07
211. I SA/Wr 1443/16 - Wyrok WSA we Wrocławiu z 2017-03-07
212. I SA/Wr 1444/16 - Wyrok WSA we Wrocławiu z 2017-03-07
213. I SA/Wr 1439/16 - Wyrok WSA we Wrocławiu z 2017-03-07
214. I SA/Wr 1440/16 - Wyrok WSA we Wrocławiu z 2017-03-07
215. I SA/Bk 1074/16 - Wyrok WSA w Białymstoku z 2016-11-23
216. II SA/Bd 693/15 - Wyrok WSA w Bydgoszczy z 2015-11-02
217. II SA/Bd 694/15 - Wyrok WSA w Bydgoszczy z 2015-11-02
218. II SA/Bd 695/15 - Wyrok WSA w Bydgoszczy z 2015-11-02
219. II SA/Bd 696/15 - Wyrok WSA w Bydgoszczy z 2015-11-02
220. V SA/Wa 1392/15 - Wyrok WSA w Warszawie z 2015-10-26
221. I SA/Kr 1121/14 - Wyrok WSA w Krakowie z 2014-10-31
222. I SA/Wr 1601/14 - Wyrok WSA we Wrocławiu z 2014-10-16
223. I SA/Wr 1602/14 - Wyrok WSA we Wrocławiu z 2014-10-16
224. I SA/Wr 1603/14 - Wyrok WSA we Wrocławiu z 2014-10-16
225. I SA/Wr 1604/14 - Wyrok WSA we Wrocławiu z 2014-10-16
226. II GSK 1172/13 - Wyrok NSA z 2014-09-24
227. II FSK 2362/12 - Wyrok NSA z 2014-09-19
228. II FSK 3399/13 - Wyrok NSA z 2014-02-28
229. II FSK 2230/11 - Wyrok NSA z 2013-03-20

LIST OF CIVIL COURT JUDGEMENTS UNDER SCRUTINY

1. XII Gz 559/21
2. I ACa 237/13
3. I C 494/16
4. VI ACa 1198/14
5. IX P 179/21
6. V ACa 795/14
7. II K 1075/21
8. VI ACa 1414/14
9. XVII AmE 114/12
10. III Ca 1070/13
11. XVI GC 336/21
12. I C 1858/12
13. I ACa 775/12
14. I ACa 182/12
15. I ACa 783/14
16. I ACa 129/13
17. XVII AmE 152/11
18. VI ACa 1414/14
19. I ACa 543/12
20. XVII AmE 133/13
21. III C 1371/16
22. XVII AmE 133/13
23. I ACa 154/19
24. II Ca 405/14
25. VIII Ua 42/20
26. I ACa 1165/17
27. III AUa 52/22
28. V ACa 345/19
29. I ACa 779/19
30. I ACa 914/12
31. V ACa 218/13
32. I ACa 1035/12
33. I ACa 524/12
34. V ACa 2/19
35. V ACa 551/18
36. III C 1069/15
37. XVII AmE 139/12
38. I Ca 425/13
39. VI ACa 1389/17
40. I ACa 1265/17
41. I C 458/15
42. I C 458/15
43. I ACa 868/21
44. III AUa 949/12
45. VI ACa 1389/17
46. I C 806/18
47. XVII AmE 190/15
48. I C 581/11
49. VI ACa 537/15
50. XII Gz 480/21
51. VI ACa 1012/15
52. XII Gz 480/21
53. VIII U 2886/20
54. I ACa 535/12
55. I C 871/15
56. I C 452/17
57. II Ca 382/14
58. XVII AmE 159/10
59. II Ca 108/15
60. VI ACa 74/13
61. XIX Gz 555/17
62. V Ca 3566/15
63. XVII AmE 162/10
64. XVII AmE 160/10
65. I ACa 467/14
66. I C 1215/14
67. I ACa 1451/14
68. I ACa 979/14
69. I ACa 83/18
70. VI ACa 1773/13
71. VI ACa 1456/15
72. XXIII Zs 114/21
73. XVII AmE 172/11
74. III AUa 541/21
75. VI ACa 258/14
76. III K 133/15
77. II Ca 1401/12
78. VI ACa 1331/12
79. III K 81/15
80. III AUa 213/18
81. I ACz 742/19
82. VIII Ga 255/13
83. XXIII Zs 98/22
84. VIII U 4227/14
85. I ACa 20/18
86. I AGa 84/20
87. IV Ka 394/18
88. VIII GC 544/20
89. XXVI GC 812/21
90. IV U 763/21
91. IV P 313/21
92. VII U 1130/21
93. I ACa 868/21
94. VII U 284/21
95. II Ca 619/22
96. XXIII Gz 1315/21
97. XVII AmT 230/19
98. XXIII Gz 1428/21
99. XVII AmT 154/19
100. XII Gz 254/22
101. XII Gz 250/22
102. XXIII Gz 1216/21
103. XXIII Gz 1317/21
104. XVI GC 1514/21
105. XVI GC 336/21
106. I C 50/20
107. VII U 487/21
108. I ACa 626/21
109. XXIII Zs 102/22
110. VII U 512/22
111. XXIII Zs 63/21
112. III AUa 541/21
113. VIII U 66/22
114. II C 1596/20
115. XVII AmT 7/20
116. VII U 1105/21
117. XXIII Gz 1031/20
118. VIII U 2132/21
119. XXIII Gz 892/21
120. V GC 1240/20
121. VIII U 2037/21
122. VIII U 1406/21
123. VII U 1422/21
124. VII U 1213/21
125. VIII U 1778/21
126. XVII AmT 196/19
127. XVII AmT 198/19
128. VII Ua 13/22
129. VII U 1000/21
130. I ACa 1294/21
131. V ACa 144/18
132. IV U 186/22
133. VIII U 1557/21
134. III AUa 1640/21
135. XII Gz 559/21
136. XII Gz 386/21
137. XII Gz 480/21
138. XII Gz 36/22
139. XVII AmT 111/18
140. VIII Gz 61/22
141. XXIII Zs 43/22
142. III AUa 1008/21
143. III AUa 1100/21
144. II K 177/22
145. I C 902/20
146. I C 871/15
147. VI U 1997/20
148. III AUa 422/21
149. XVII AmT 132/18
150. III AUa 1314/19
151. IV U 381/21
152. IV U 343/21
153. III RC 67/21
154. IV U 39/22
155. I ACa 223/21
156. VII U 288/21
157. VII U 794/21
158. II Ca 1774/20
159. III AUa 1153/21
160. III AUa 52/22
161. I C 696/21
162. II K 1063/21
163. III AUa 367/19
164. VIII U 499/21
165. VIII U 2886/20
166. II K 17/18
167. XVII AmT 31/17
168. V U 763/20
169. III AUa 291/21
170. VIII U 1329/21
171. IV U 759/21
172. VIII U 1819/21
173. III AUa 626/19
174. II AKa 248/21
175. XII Ga 928/18
176. V U 810/20
177. V U 912/20
178. I Ca 427/21
179. VII U 440/21

180.	III AUa 503/20	240.	II K 171/19	300.	XVII AmE 346/18
181.	XVII AmT 16/20	241.	XVII AmT 226/19	301.	VII AGa 127/19
182.	III AUa 1732/19	242.	XVIII K 337/19	302.	I ACa 210/18
183.	VII U 628/21	243.	XVII AmT 17/19	303.	I ACa 233/18
184.	VII U 562/21	244.	XVII AmT 17/19	304.	III Ca 1892/18
185.	VIII U 1501/21	245.	I AGa 84/20	305.	III AUa 213/18
186.	VIII U 1073/21	246.	V ACa 73/21	306.	III AUa 973/18
187.	VIII U 827/21	247.	XXIII Gz 471/20	307.	I C 173/18
188.	VII U 959/21	248.	IV U 213/21	308.	VIII Ga 737/18
189.	VII U 1116/21	249.	III AUa 1107/20	309.	I AGa 136/18
190.	III AUa 282/21	250.	II Ca 1426/20	310.	I ACa 200/18
191.	VIII U 1533/21	251.	II K 18/15	311.	XII C 1681/18
192.	VII U 1117/21	252.	XIV C 65/18	312.	XVII AmE 13/17
193.	III AUa 33/21	253.	I ACa 134/20	313.	XXV C 1805/16
194.	VII U 319/21	254.	XXVI GCo 269/20	314.	XVII AmE 123/16
195.	XVII AmT 80/19	255.	XVII AmT 73/19	315.	VII AGa 548/18
196.	III AUa 519/21	256.	I ACa 647/18	316.	I C 675/18
197.	III AUa 1058/17	257.	I ACa 730/19	317.	XVII AmK 17/16
198.	VII U 952/20	258.	XVII AmE 151/18	318.	XVII AmE 206/17
199.	IX P 179/21	259.	IV U 614/20	319.	XVII AmE 181/16
200.	III AUa 572/21	260.	VIII U 1686/20	320.	VI ACa 389/17
201.	XVII AmT 214/19	261.	I ACa 888/17	321.	VIII Gz 47/19
202.	III AUa 506/20	262.	I C 1274/19	322.	VIII Gz 1/19
203.	I ACa 34/20	263.	VIII U 1452/20	323.	I ACa 1486/17
204.	V U 899/20	264.	VIII U 1480/20	324.	III Ca 1410/18
205.	VIII GRz 12/21	265.	V ACa 345/19	325.	I C 1909/16
206.	III AUa 302/21	266.	XXIII Gz 1363/18	326.	XVII AmA 2/17
207.	VII U 776/20	267.	XVII AmT 68/18	327.	IV Ka 394/18
208.	VII U 804/20	268.	XVII AmE 380/17	328.	I ACa 1165/17
209.	VII U 1188/20	269.	II Ca 2717/15	329.	XVII AmE 170/16
210.	VI GRp 3/17	270.	IV U 1195/20	330.	III Ca 987/18
211.	VI GRz 3/20	271.	II AKa 44/20	331.	I C 591/17
212.	VIII Gz 102/21	272.	I C 1208/18	332.	I AGa 94/18
213.	VII U 1484/20	273.	I C 830/17	333.	XVII AmE 80/16
214.	VII U 820/20	274.	I C 2180/13	334.	XXV C 1103/18
215.	XVII AmT 151/19	275.	III AUa 2464/15	335.	XI GC 305/18
216.	XXIII Zs 34/21	276.	I ACa 1127/18	336.	XVII AmK 12/16
217.	VIII U 396/21	277.	I C 806/18	337.	II C 114/15
218.	III AUa 154/21	278.	XVII AmE 353/17	338.	I ACa 1265/17
219.	III AUa 184/21	279.	XVII AmE 347/17	339.	XVII AmE 51/16
220.	XVII AmE 274/18	280.	V AGa 30/19	340.	VII W 631/17
221.	XVII AmT 98/19	281.	I ACa 1784/14	341.	III Ca 1976/17
222.	XVII AmT 129/19	282.	I C 81/19	342.	II AKa 152/17
223.	XVII AmT 40/19	283.	XVII AmE 290/17	343.	XXIII Ga 209/18
224.	XVII AmT 33/19	284.	V ACa 2/19	344.	I ACa 20/18
225.	XVII AmT 63/19	285.	IV U 123/15	345.	VII AGa 944/18
226.	XVII AmT 62/19	286.	VI ACa 821/18	346.	I ACa 672/17
227.	XVII AmT 79/19	287.	XIII Ga 747/19	347.	I ACa 83/18
228.	VIII U 549/21	288.	II K 808/19	348.	I ACa 279/16
229.	VIII U 1071/21	289.	XXIII Ga 423/18	349.	I AGa 86/18
230.	VIII U 695/21	290.	IV P 86/18	350.	XI GC 934/13
231.	III RC 193/20	291.	III C 123/18	351.	X GC 998/17
232.	I C 135/18	292.	XVII AmE 202/17	352.	VIII C 25/18
233.	III AUa 16/21	293.	VI Ka 473/19	353.	I C 736/13
234.	XVII AmT 71/18	294.	I ACz 742/19	354.	I C 60/14
235.	XVII AmT 92/19	295.	I ACa 558/18	355.	I C 1246/17
236.	XVII AmT 70/19	296.	VI ACa 859/18	356.	XVII AmE 154/10
237.	I ACa 154/19	297.	I ACa 570/18	357.	XIX Gz 555/17
238.	VIII U 1395/20	298.	VI ACa 1389/17	358.	XVII AmE 141/14
239.	III U 150/21	299.	XVII AmE 348/17	359.	I C 635/16

360.	II Ca 1601/15	420.	I ACa 1497/14	480.	I ACa 763/15
361.	I ACa 584/17	421.	I C 263/15	481.	I C 2127/15
362.	I ACa 567/17	422.	XVII AmE 151/12	482.	I C 1218/15
363.	II Ca 510/16	423.	II Ca 2254/16	483.	I C 404/15
364.	VIII U 1059/17	424.	II C 780/12	484.	V ACa 600/15
365.	VIII U 4227/14	425.	I C 939/14	485.	I C 747/15
366.	I ACa 544/17	426.	I C 471/16	486.	I C 746/15
367.	I C 452/17	427.	XVIII C 714/16	487.	VII Pa 336/15
368.	II Ca 1305/13	428.	II Ca 1461/16	488.	I C 708/15
369.	XVII AmE 98/11	429.	XXIII Ga 312/15	489.	I ACa 1401/15
370.	VI ACa 135/16	430.	XXIII Ga 586/15	490.	II Ca 942/14
371.	I C 1164/17	431.	I ACa 715/16	491.	IV U 827/15
372.	VI ACa 38/16	432.	I ACa 748/16	492.	I ACa 687/15
373.	XVII AmE 201/10	433.	VII U 448/16	493.	III AUa 669/15
374.	IV K 510/17	434.	I ACa 517/16	494.	I ACa 899/15
375.	I C 1646/16	435.	I C 832/14	495.	I C 24/15
376.	VIII U 302/15	436.	XVII AmE 181/11	496.	VI Ka 758/15
377.	XVII AmE 177/11	437.	XVII AmE 152/11	497.	X P 433/15
378.	II Ca 558/16	438.	XVII AmE 151/11	498.	VI ACa 1414/14
379.	IV K 432/14	439.	XVII AmE 146/14	499.	I C 344/15
380.	XVII AmE 160/09	440.	II Ca 313/16	500.	XXV C 891/10
381.	V RC 308/17	441.	I ACa 303/16	501.	I ACa 2011/14
382.	VI ACa 1292/15	442.	II Cz 661/16	502.	VI ACa 829/15
383.	II Ca 557/15	443.	VIII C 2957/15	503.	VI ACa 1057/14
384.	II Ca 557/15	444.	XVII AmE 102/13	504.	I C 2007/15
385.	II Ca 598/14	445.	I ACa 617/16	505.	I ACa 1231/14
386.	II Ca 382/14	446.	I ACa 138/16	506.	III U 453/15
387.	I ACa 957/16	447.	VI U 667/15	507.	I ACa 355/15
388.	V ACa 745/16	448.	I ACa 282/16	508.	VII C 505/12
389.	II Ca 1046/13	449.	III AUa 2112/15	509.	XIII Ca 117/15
390.	II Ca 1404/13	450.	XVII AmE 172/11	510.	I C 580/14
391.	XVII AmE 91/16	451.	VI ACa 692/15	511.	I C 444/11
392.	II Ca 429/13	452.	I ACa 587/15	512.	I ACa 979/14
393.	II Ca 25/13	453.	III AUa 2137/15	513.	XII Ga 713/14
394.	II Ca 1401/12	454.	VI ACa 537/15	514.	VIII Ga 184/15
395.	X C 795/16	455.	XVII AmE 34/11	515.	XXIII Ga 1293/14
396.	IX P 707/16	456.	I C 1635/15	516.	III Ca 1852/14
397.	XVII AmE 109/16	457.	XVII AmA 153/09	517.	IV Ca 204/15
398.	I C 1215/14	458.	I ACa 1171/15	518.	III Ca 1572/14
399.	I C 3443/15	459.	II K 76/15	519.	II Ca 1043/14
400.	V ACa 133/17	460.	VI Ka 128/16	520.	XVII AmE 92/08
401.	III C 1548/16	461.	XVII AmE 33/12	521.	VI Ka 213/15
402.	II Ca 653/16	462.	VI Gz 114/16	522.	I ACa 47/15
403.	I C 890/16	463.	I ACa 1625/15	523.	VI ACa 448/15
404.	VIII U 2846/16	464.	IV P 782/15	524.	I ACa 212/15
405.	VIII U 1079/16	465.	XVII AmE 101/13	525.	VI ACa 1390/14
406.	I ACa 542/16	466.	XVII AmE 114/12	526.	VI ACa 761/14
407.	VI ACa 1012/15	467.	IV U 1352/14	527.	II Ca 108/15
408.	I ACa 1451/14	468.	I C 742/15	528.	III Ca 536/14
409.	I ACa 748/16	469.	I C 743/15	529.	I ACa 25/14
410.	XVII AmE 150/10	470.	XVII AmE 82/12	530.	I ACa 1476/14
411.	XVII AmE 159/10	471.	I ACa 948/15	531.	V ACa 795/14
412.	XVII AmE 162/10	472.	I ACa 1705/14	532.	I ACa 467/14
413.	XVII AmE 169/11	473.	V Ca 3466/13	533.	I C 1472/14
414.	XVII AmE 200/10	474.	V Ca 3765/13	534.	I ACa 1601/14
415.	I C 1185/16	475.	I ACa 1823/15	535.	I ACa 609/14
416.	XVII AmE 133/13	476.	XXIII Ga 1990/15	536.	III AUa 1062/14
417.	XIX Ga 3/17	477.	I C 1219/15	537.	I C 1227/14
418.	III C 1069/15	478.	VIII U 2060/15	538.	III Ca 1115/14
419.	XVII AmE 7/13	479.	XVIII C 181/15	539.	I ACa 522/14

540.	VI ACa 258/14	580.	VI ACa 1035/13	620.	I ACa 129/13
541.	I C 2502/13	581.	I C 2092/13	621.	VI ACa 4/13
542.	VI ACa 1773/13	582.	VIII GC 72/12	622.	I ACa 12/13
543.	I ACa 783/14	583.	I ACa 606/13	623.	II Ca 481/12
544.	VI ACa 1606/13	584.	II C 88/13	624.	XV GC 739/12
545.	III Ca 805/14	585.	I ACa 1287/13	625.	I C 88/13
546.	I C 598/14	586.	II C 796/13	626.	V ACa 218/13
547.	I C 1629/12	587.	I ACa 329/11	627.	I ACa 25/13
548.	III Ca 791/14	588.	I ACa 776/13	628.	II Ca 155/13
549.	V U 1019/13	589.	III Ca 1198/13	629.	VI ACa 1364/12
550.	III AUa 328/14	590.	I C 542/11	630.	VI ACa 528/11
551.	I ACa 182/12	591.	I ACa 542/13	631.	IX C 985/12
552.	I ACa 699/14	592.	I C 581/11	632.	I ACa 1326/12
553.	I ACz 2288/14	593.	I ACa 571/13	633.	I C 189/13
554.	III Ca 530/14	594.	I ACa 577/13	634.	I ACa 1443/12
555.	I C 518/14	595.	II Cz 1600/13	635.	III AUa 949/12
556.	I C 2145/13	596.	I ACa 695/13	636.	VI ACa 995/12
557.	I C 2150/13	597.	VI ACa 498/13	637.	V ACa 926/12
558.	I ACa 264/14	598.	I ACa 354/13	638.	VIII Ga 409/12
559.	VI ACa 625/13	599.	VI ACa 278/13	639.	V U 130/13
560.	III K 71/13	600.	III Ca 1070/13	640.	I ACa 791/12
561.	I ACa 347/14	601.	I C 2243/13	641.	VI ACa 967/12
562.	I C 738/14	602.	I ACa 7/13	642.	I ACa 910/11
563.	V Pa 92/14	603.	II Co 8/14	643.	I ACa 1044/12
564.	I ACa 241/14	604.	VIII GC 365/13	644.	I ACa 1209/12
565.	III AUz 76/14	605.	II Ca 293/13	645.	I ACa 1154/12
566.	I ACa 674/14	606.	II Ca 973/13	646.	I ACa 1008/12
567.	II Ca 475/14	607.	II Ca 1057/13	647.	I ACa 1097/12
568.	III Ca 1784/13	608.	I C 1858/12	648.	VI ACa 568/12
569.	IX GC 1061/13	609.	I ACa 725/13	649.	I ACa 981/12
570.	I C 1424/13	610.	VI ACa 1517/12	650.	III AUa 605/11
571.	I ACa 1468/13	611.	VI ACa 1240/12	651.	I ACa 284/12
572.	II Ca 65/13	612.	I ACa 777/13	652.	I ACa 543/12
573.	I ACa 938/13	613.	VI ACa 1421/12	653.	I ACa 535/12
574.	I ACa 315/14	614.	I Ca 391/13	654.	I ACa 1035/12
575.	I ACa 902/13	615.	III AUa 375/13	655.	I ACa 524/12
576.	I ACa 806/13	616.	IX Ca 728/12	656.	I ACa 775/12
577.	IV U 1820/11	617.	VI ACa 74/13	657.	III AUa 970/12
578.	IV U 1746/11	618.	VIII Ga 255/13	658.	I ACa 127/12
579.	I C 1388/11	619.	VI ACa 1331/12	659.	II AKa 250/12

Spain

Context

- 1. Have the public authorities or national courts in the Member State expressed any public opinion or issued any ruling referring to the application of the Austria v. Commission (Hinkley Point C) judgment and its implications at national level (e.g. on checks to be performed before or after granting aid, interactions with the EU Commission, or access to justice rules or practices)? If yes, please provide a short summary as well as a reference to where this public opinions or judgements can be accessed.**

We are not aware of any such publicly made comments or rulings.

- 2. Are public consultations organised at national or local level on planned aid measures or schemes? Please specify if this includes all or only certain planned measures or schemes and whether these consultations are open to participation by environmental NGOs. Please provide recent examples of such consultations with the references to the relevant websites.**

At national level, the Ministry launches public consultations during the process of drafting certain norms²⁷⁷. Some of the public consultations may include planned aid measures²⁷⁸. Comments are open to all users. The Spanish Competition Authority (CNMC) organizes public consultations periodically, on diverse subjects, for example, on its “Plan de Actuaciones” (*Roadmap*²⁷⁹). The roadmap included references, although generic, to State aid. Likewise, the CNMC organised a public consultation to comment on its Strategic Plan 2021-2026 (“Plan Estratégico 2021-2026”²⁸⁰) during the same period. There have also been public consultations launched in sectors like transport, telecommunication or energy. Furthermore, the CNMC also launches public consultations regularly on different topics, in the context of promotion of competition²⁸¹. The latest²⁸² on renewable energies could be accessed and answered by any user.

Standing

- 3. Which of the administrative or civil courts are competent to challenge government measures in court for alleged unlawful State aid and for asking remedies (including suspension, recovery of aid and damages)? Do the rules differ (and how) between administrative and civil courts?**

Challenges to government measures for alleged unlawful State aid generally take place in the administrative courts (“jurisdicción contencioso administrativa”), as they generally have jurisdiction when an administrative act from a granting authority is attacked. The procedure is ruled by the procedural provisions foreseen in Law 29/1998, of 13 July²⁸³, regulating the administrative jurisdiction.

²⁷⁷ [https://portal.mineco.gob.es/es-es/ministerio/participacionpublica/Paginas/Participacion_publica_\(presentacion\).aspx](https://portal.mineco.gob.es/es-es/ministerio/participacionpublica/Paginas/Participacion_publica_(presentacion).aspx)

²⁷⁸ See, for example, Consulta pública sobre la identificación de zonas que no disponen de cobertura de redes móviles que proporcionen un servicio 4G a una velocidad mínima de 50 Mbps, sobre el proyecto de orden ETD/XXX/2023 por la que se establecen las bases reguladoras de la concesión de ayudas para la provisión del conjunto de equipamiento activo e infraestructura auxiliar necesaria para la provisión de servicios de comunicaciones móviles con tecnología 5G en zonas donde no existe cobertura móvil 4G con servicio mínimo de 50 Mbps y se procede a una primera convocatoria, en el marco del Plan de Recuperación, Transformación y Resiliencia - financiado por la Unión Europea - NextGenerationEU. Programa "UNICO 5G Redes Activas", y sobre la demanda de servicios y aplicaciones 5G en zonas rurales. ([mineco.gob.es](https://portal.mineco.gob.es))

²⁷⁹ Roadmap available here: [Plan de Actuaciones CNMC 2021-22_DEF.pdf](#)

²⁸⁰ Strategic plan available here: [Plan Estratégico CNMC 21-26_DEF.pdf](#)

²⁸¹ A list of the latest public consultations launched can be found here: [Promoción de la competencia | CNMC](#)

²⁸² Until 1 March 2023.

²⁸³ [BOE-A-1998-16718 Ley 29/1998, de 13 de julio, reguladora de la Jurisdicción Contencioso-administrativa.](#)

Furthermore, as indicated by Pérez Rivarés²⁸⁴, “competitors have standing to file an ordinary appeal and administrative appeal (“recurso contencioso-administrativo”) as well as to bring the action before the Commercial Courts, on the basis of the Unfair Competition Law (“Ley de Competencia Desleal”²⁸⁵)”²⁸⁶. In this case, civil or commercial courts have jurisdiction. As indicated by Dr. Piernas López²⁸⁷, “the Supreme Court made clear that the civil courts do not have the competence to declare unlawful the acts of the public administrations, at least those of a clear administrative nature, which are liable to distort competition and to violate Articles 107(1) and 108(3) TFEU. The administrative courts are competent in that respect (e.g. ruling ECLI: ES:TS:2009:6155).”

On recovery, Law 38/2003, the General Law on Subsidies, and Royal Decree 887/2006 of 21 July 2006 provide for an *ad hoc* recovery administrative procedure applicable to the recovery of State aid granted in the form of grants.

- 4. Have national courts recognised standing of parties whose competitive position is not affected by the grant of unlawful aid? Please reply with “yes”, “no” or “unclear”. If the reply is “yes”, please also specify whether the national courts applied the EU General Court ruling in *Streekgewest Westelijk Noord-Brabant v Staatssecretaris van Financien (C-174/02, paragraph 19)* – or have developed their own jurisprudence.**

Unclear- data not found.

More generally, Article 19 of Law 29/1998, of 13 July²⁸⁸, regulating the administrative jurisdiction indicates those who have legal standing before the administrative jurisdiction (before the “orden jurisdiccional contencioso-administrativo”). Among others, points a) and b) of that article grant legal standing to: a) natural or legal persons having a legitimate right or interest and b) corporations, associations, unions and groups and entities referred to in Article 18 that are affected or are legally authorised to defend legitimate collective rights and interests.

- 5. If the answer to question 4 is “yes”, do environmental NGOs have standing before national administrative bodies (if any) or courts competent in State aid matters to challenge government measures for alleged unlawful State aid? Please reply with “yes”, “no” or “unclear”.**

Not found.

- 6. If the answer to question 5 is “yes”, which criteria do NGOs need to fulfil to be granted standing (some examples of criteria may include registration / accreditation with a specific body; number of members; certain period of existence; requirements as to its statutory purpose or form of incorporation; relationship between its activities and the aid challenged etc.)? Are the criteria different for foreign NGOs (i.e. not registered in the country where the aid is challenged)?**

Not found.

²⁸⁴ J.A. Pérez Rivarés, “La aplicación del derecho de la Unión Europea sobre ayudas estatales por los tribunales nacionales” (see Bibliography).

²⁸⁵ Ley 3/1991, de 10 de enero, de Competencia Desleal.

²⁸⁶ *Ibid.*, p.39, our translation.

²⁸⁷ Study on the enforcement of State aid rules and decisions by national courts Country report Spain, available here: [State Aid \(mybit.nl\)](http://mybit.nl)

²⁸⁸ BOE-A-1998-16718 Ley 29/1998, de 13 de julio, reguladora de la Jurisdicción Contencioso-administrativa.

7. **Has an NGO with an environmental object previously brought an action against a State aid measure or scheme in the Member State and been recognised by the courts as being entitled to do so? Please reply with “yes” or “no”. If the answer is “yes”, please also detail the context and the outcome of the judgement(s) concerned (admissibility and merits of the action).**

Not found.

8. **Have national courts already relied on / referred to point 27 of the revised Commission’s Notice on the enforcement of State aid law by national courts recommending to grant standing to NGOs? Please reply, to the best of your knowledge, with “yes” or “no”. If yes, please also provide a short summary as well as a reference to where the relevant judgement can be accessed.**

Not found.

Available grounds

9. **Can a claimant (any category) raise claims related to violations of EU or national environmental law by an aid measure or an activity in support of an action aiming at challenging the grant of aid? Please reply with “yes”, “no” or “no data”.**

No data found on specific claims on environmental law claims in support of an action aiming the challenging of an aid measure.

10. **Are there examples of cases where such claims were raised (if so please detail the context and outcome)?**

No data.

11. **More generally, are there instances of claimants (any category) alleging, in support of an action challenging an aid measure or scheme, that a State aid measure or activity breached EU or national law that is not directly State aid law (other than environmental law, which is covered by question 9 above, such as law on public procurements, planning law, tax law etc.)? Please detail the context and the outcome (competence of the courts, merits of the claim and potential test applied by the court, potential reference for preliminary ruling to the CJEU under Article 267 TFEU)?**

In the Supreme Court decision on the matter *Fred Olsen*²⁸⁹, it was claimed that a State aid scheme allowed for an abuse of dominant position of the competitor, since it was able to reduce its prices to a level below its costs thanks to the aid obtained. The claimant alleged the violation of national provisions on unfair competition (articles 15.1 and 2 and 17.2.c of Law 3/1991, of 10 January, on Unfair Competition, “Ley de Competencia Desleal”) and other competition law provisions (Article 6.2.a of Law 16/1989 of Defense of Competition). The Supreme Court dismissed the argument and rejected the illegality of the lower prices and their predatory nature.

²⁸⁹ STS 7285/2009. ECLI:ES:TS:2009:7285.

12. Have there been any instances in the Member States of a national court referring the validity of a Commission’s State aid decision to the CJEU under Article 267 TFEU between 1 January 2019 and 31 December 2022?

Not found.

There was only one preliminary ruling request concerning State aid by Spain in 2022, according to the statistics of the Spanish “Poder Judicial”²⁹⁰. The question, however, relates to a request for a preliminary ruling on interpretation and not on validity (Question 3 of C-475/22 *Maxi Mobility Spain*).

Procedural costs risks

13. If the answer to question 5 is “yes”, what are the procedural costs and potential adverse costs to be incurred by an NGO for bringing a State aid-related action before a national court, both in case the challenge is ultimately successful and if it unsuccessful?

Answer to question 5 is no.

As regards to general procedural costs, a particular situation must be noted for NGOs. Law 27/2006 on rights of access to information, public participation and access to justice on environmental matters establishes on article 23.2 that “non-profit legal persons referred to in the preceding paragraph shall be entitled to free legal aid under the terms provided for in Law 1/1996, January 10, 1996, on the terms set forth in Law 1/1996, of January 10, 1996, on Free Legal Assistance”. This applies to all non-profit legal persons that start a popular action in environmental matters following article 22 of Law 27/2006 and that a) have among the purposes stated in their bylaws the protection of the environment in general or of any of its elements in particular; b) have been legally constituted at least two years prior to the exercise of the action and that they have been actively carrying out the activities necessary to achieve the purposes set forth in their bylaws; and c) that according to their bylaws they carry out their activity in a territorial area affected by the administrative action or, as the case may be, omission.

The law on free legal assistance provides it for those who can prove insufficient resources for litigation. However, in 2019 the Supreme Court recognised²⁹¹ that environmental NGOs that have been granted the right to free legal aid on the basis of the Aarhus Act are exempt from paying legal costs, irrespective of their financial resources. In that case, the Supreme Court annulled the costs to which an environmental organization had initially been ordered to pay²⁹². Nevertheless, the Court’s decision does not apply automatically (even if theoretically the decision should be followed). In fact, some of the commissions in charge of granting free legal assistance (*Comisiones de Asistencia Jurídica Gratuita*) still reject the application for free assistance from some NGOs²⁹³. This right will only be fully enforceable if the legal provisions change (which the technical advisors of the abovementioned report, as well as other interested parties, have recommended).

As for the general costs, article 139 of the Law regulating the administrative jurisdiction indicates how the “costas procesales” are assigned (first instance: on the party whose claims have been rejected in their entirety, unless the court finds and gives reasons therefor that the case presented serious doubts of fact or law; in appeals, costs shall be imposed on the appellant if the appeal is totally dismissed, unless the court, with due reasoning, appreciates the existence of circumstances that justify not

²⁹⁰ Excel with the overview of preliminary rulings submitted by Spain between 1998 and 2022 and classified by subject can be found here: <https://www.poderjudicial.es/cgpj/es/Temas/Estadistica-Judicial/Estadistica-por-temas/Aspectos-internacionales/Cuestiones-prejudiciales-iniciadas-ante-el-Tribunal-de-Justicia-de-la-Union-Europea/>

²⁹¹ Auto del Tribunal Supremo, 13 March 2019, ECLI:ES:TS:2019:3200A.

²⁹² IIDMA, Access to Justice in Spain, Practical Guide, Section 3 [16_05_2019_Spanish_National_Toolkit_FINAL \(iidma.org\)](https://iidma.org).

²⁹³ Report of the Compliance Committee for Spain, Point XXXIX, [meetingofthepartiestotheconventiononaccesstoinformationpublicparticipationinddecisionmakingandaccesstojusticeinenvironmentalmatters tcm30-530563.pdf \(miteco.gob.es\)](https://www.miteco.gob.es/documentos/2020/03/16/16_05_2019_Spanish_National_Toolkit_FINAL.pdf)

imposing them.) The procedure used to calculate these costs is the same followed in the civil jurisdiction and established in Law 1/2000 of 7 January, of civil procedure. Article 241 provides that it includes, among others, costs of defense and technical representation fees when they are mandatory, mandatory publication of announcements, necessary deposits for appeal, costs of experts, copies, certifications, notes, and other rights.

Remedies

14. In case the reply to questions 4 and/or 5 is yes, what remedies are available to non-competitor applicants before an administrative body (if any) or a court in case of breach of environmental law by an aid measure or by the activity?

Answer to questions 4 and 5 are no.

In a procedure before the administrative courts, article 31 of the Law regulating the administrative jurisdiction provides that the applicant (with legal standing) may request a declaration of illegality and, where appropriate, the annulment of the acts and rules susceptible of being challenges. The Law also allows interested parties to request measures aiming at ensuring the effectiveness of the judgment (article 129). Both provisions cover “the prevention of the payment of not-yet-paid unlawful aid; the recovery of paid unlawful aid, as well as the illegality interest; damages suffered by competitors and other third parties; and interim measures against unlawful aid.”²⁹⁴

Transparency

15. How can third parties find out about possible planned, unlawful or incompatible State aid from official sources? Are there national registers? What publicity is given to the granting of aid and to its notification to the EU Commission?

Law 19/2013 of 9 December 2013 on transparency, access to public information and good governance establishes that private entities that receive an amount greater than 100,000 euros during the period of one year as public aid or subsidies of any nature in are subject to certain obligations of active publicity. Beneficiaries can be identified here: Base de Datos Nacional de Subvenciones (hacienda.gob.es). Information on *de minimis* aid is also included (in accordance with the provisions of Article 7.8 of Royal Decree 130/2019, information on grants remains published during the four calendar years following the year in which the grant was awarded in the case of legal persons, and in the case of natural persons publicity is limited to the year of grant and the following year). Moreover, the CNMC (following Article 11.2 of Law 15/2007, of 3 July, on Defense of Competition) publishes an Annual Report on State aid granted in Spain following the data obtained from the European Commission. The CNMC also prepares reports regarding individual aids and makes proposals to the public administrations to maintain effective competition in the markets. For example, the CNMC assessed the potential introduction of a new regional tax²⁹⁵ and the report included an evaluation of the risk of the tax from a State aid perspective (section 2 of the report). In the same line, for example in a report assessing the fares applied to urban transportation services at the local level of a city, the CNMC concluded that the public administration in charge of a measure must notify it to the European Commission in view of the State aid provisions²⁹⁶. This conclusion was also reached when evaluating a similar situation (the adjustment of the remuneration for industrial benefits received by a company for performing the urban transport services of that city)²⁹⁷.

²⁹⁴ L. Arroyo Jiménez and P. Pérez Fernández, “Private Enforcement of State aid Law in Spain”, page 4, Preprint-No-1-19_compressed.ashx (uclm.es)

²⁹⁵ Plantilla Informe CNMC

²⁹⁶ 1992386_16.pdf (cnmc.es), page 16.

²⁹⁷ 2247189_13.pdf (cnmc.es), page 13.

16. Please provide details of any national legislation that gives third parties access to documents on State aid granted to beneficiaries that are held by national public authorities.

Access to public information is a right provided for Article 105.b) of the Spanish Constitution of 1978, establishing that laws shall regulate citizens' access to archives and administrative records administrative records, except in matters that affect the security and defense of the State, the investigation of State, the investigation of crimes and the privacy of individuals.

Law 39/2015 of 1 October 2015 on the Common Administrative Procedure of Public Administrations recognizes that interested parties have the right to access and obtain copies of the documents contained in the administrative proceedings.

Law 19/2013 of 9 December 2013 on transparency, access to public information and good governance grants the right to access public information within the limits established in its Article 14 (with the possibility of a partial access as foreseen by Article 16).

Law 27/2006 on rights of access to information, public participation and access to justice on environmental matters specifies these rights for, among others, NGOs.

Bibliography

Articles

A. Creus Carreras, “La recuperación de las ayudas ilegales de Estado”, available here: [DE002-16 La recuperacion ayudas legales estado-Creus.pdf \(frdelpino.es\)](#)

J.A. Pérez Rivarés, “La aplicación del Derecho de la Unión Europea sobre ayudas estatales por los tribunales nacionales”, available here: https://www.uria.com/documentos/publicaciones/3573/documento/RDCE_Rivares.pdf?id=4349_es&forceDownload=true

G. Fernández Farreres, “El régimen de las ayudas de Estado y su impacto en el Derecho español”, available here: [37779germanfernandezfarreresrap200.pdf \(cepc.gob.es\)](#)

L. Arroyo Jiménez and P. Pérez Fernández, “Private Enforcement of State aid Law in Spain”, page 4, [Preprint-No-1-19_compressed.ashx \(uclm.es\)](#)

Laws

Ley 15/2007, de 3 de julio, de Defensa de la Competencia, available here: [BOE-A-2007-12946](#)

Ley 38/2003, de 17 de noviembre, General de Subvenciones, available here: [BOE-A-2003-20977](#)

Ley 19/2013, de 9 de diciembre, de transparencia, acceso a la información pública y buen gobierno, available here: [BOE-A-2013-12887](#)

Ley 29/1998, de 13 de julio, reguladora de la Jurisdicción Contencioso-administrativa, available here: [BOE-A-1998-16718](#)

Ley 3/1991, de 10 de enero, de Competencia Desleal, available here: [BOE-A-1991-628](#)

Real Decreto 130/2019, de 8 de marzo, por el que se regula la Base de Datos Nacional de Subvenciones y la publicidad de las subvenciones y demás ayudas públicas, available here: [BOE-A-2019-4671](#)

Real Decreto 261/2008, de 22 de febrero, por el que se aprueba el Reglamento de Defensa de la Competencia, available here: [BOE-A-2008-3646](#)

Official sources

[Legislación y documentación \(miteco.gob.es\)](#) : legislación fundamental relativa al derecho de acceso a la información medioambiental a nivel internacional, comunitario y nacional, así como acceso a las Guías de Aplicación tanto del Convenio de Aarhus como del Protocolo PRTR asociado.

Meeting Of The Parties To The Convention On Access To Information, Public Participation In Decision-Making And Access To Justice In Environmental Matters [meetingofthepartiestotheconventiononaccesstoinformationpublicparticipationindecisionmakingandaccesstojusticeinenvironmentalmatters_tcm30-530563.pdf \(miteco.gob.es\)](#)

Other reports

IIDMA, “El Acceso a la Justicia en España”, available here: [16_05_2019_Spanish_National_Toolkit_FINAL \(iidma.org\)](#)

Spark Legal Network, the European University Institute, Ecorys and Caselex “Final Study on the enforcement of State aid rules and decisions by national courts (COMP/2018/001)”

Brussels Beijing Berlin London Warsaw Madrid Los Angeles Luxembourg

ClientEarth is an environmental law charity, a company limited by guarantee, registered in England and Wales, company number 02863827, registered charity number 1053988, registered office 10 Queen Street Place, London EC4R 1BE, a registered international non-profit organisation in Belgium, ClientEarth AISBL, enterprise number 0714.925.038, a registered company in Germany, ClientEarth gGmbH, HRB 202487 B, a registered non-profit organisation in Luxembourg, ClientEarth ASBL, registered number F11366, a registered foundation in Poland, Fundacja ClientEarth Poland, KRS 0000364218, NIP 701025 4208, a registered 501(c)(3) organisation in the US, ClientEarth US, EIN 81-0722756, a registered subsidiary in China, ClientEarth Beijing Representative Office, Registration No. G1110000MA0095H836. ClientEarth is registered on the EU Transparency register number: 96645517357-19. Our goal is to use the power of the law to develop legal strategies and tools to address environmental issues.